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Making Sense of Political Trials: Causes and Categories

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MAKING SENSE
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POLITICAL TRIALS:
CAUSES AND CATEGORIES

by
BARBARA J. FALK

Political trials have been common in history, and have taken place in both consolidated democracies that respect the rule of law as well as authoritarian regimes. As concentrated legal narratives and expressions of political activity, such trials are neither entirely pejorative nor positive. They are microcosms of a specific political and cultural universe they seek to represent in concentrated legal form, and knowledge of context and the facts of each particular case are paramount. How then can such trials be analyzed and compared? The essay examines the current literature on political trials and argues against a single all-encompassing definition or typology in favour of a non-determinative list of criteria that illustrate how and under what conditions justice is politicized. Such a nuanced understanding of the range and type of factors that politicize trials is important because parallels between the Cold War and the current Global War on Terror indicate that such trials are not a feature of the remote past. Interpreting and applying the criteria suggested here would be helpful in order to recognize the processes of politicization, the didactic value of trials, particularly in situations of political transition.

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INTRODUCTION:

WHAT CONSTITUTES A “POLITICAL” TRIAL?

What makes an ordinary trial a “political” trial? It is commonplace to suggest that *some* trials are political or have been politicized, but we usually make no effort at further definition, except to attach a pejorative connotation to the label. We applaud the separation between partisan or legislative politics and the courts, and we recognize that in societies that respect the rule of law and that grant institutional independence to the judiciary, legal outcomes will be just, balanced, and predictably fair. The important and central “truth seeking” function of the trial process is enhanced when legal norms are followed rather than deliberately, covertly, or systemically undermined; in this way the legitimacy of verdicts is enhanced. The political direction of courts is a hallmark of authoritarian regimes; however, law and politics are *not* as separate in liberal democracies as one might always expect.

Trials are sometimes inherently political or become politicized given certain conditions, such as a sense of expediency in the midst of a war or national crisis, or because certain offences are purposefully designed by the state to criminalize certain kinds of political activity.¹ In authoritarian regimes, trials are often written off as political to the core – as bizarre exercises in ritualistic legitimation, whatever gloss of legality a courtroom provides. Can we speak of these very different kinds of trials in the same breath using the same language of the “political trial”? Would such a definition be so elastic or so narrow as to become meaningless? Are there common features to *all* trials that are classed as “political trials,” or do those features vary according to the political system and/or historical epoch, and in terms of the evolution of and procedural safeguards

¹ A related question is the definition of political criminality. The classic definition is that of Stephen Schafer, who distinguished between “convictional” criminals who commit crimes on the basis of ideological or altruistic motives (believing the action taken to be morally correct or serving political ends) and “conventional” criminals who act largely from selfish motives. As in the case of political trials, the line is not always easy to draw, overlap is inevitable, and a “thick” understanding of the social and political context and the particular facts of a case are absolutely necessary. To be avoided is a narrowly positivist (and tautological) definition that would define political crime as circumscribed behaviour that violates the criminal law of any given state. In most cases, those actions most fitting the label of “political crime” are those which threaten the sovereignty and security (understood both in terms of military and human security) of a state. See Schafer (1971, 380-87) and Ingraham (1979, esp. chap. 1).

within Western legal traditions? A common view is that legal norms and the evolution of due process constitute a grand narrative of historical progress. Does this mean we are any closer to eliminating legal “deviance” as represented by political trials? Though the term is pejorative in the first instance, it is possible to argue that political trials have positive, pedagogical, and even “strategic” dimensions – that they are a viable policy option for those in power.

This paper reviews earlier efforts at defining political trials and the difficulties inherent in this lexical task. In revisiting the topic of political trials, I argue against simplistic reductionism, which would have it that all trials are in some sense political because they reflect the values of the political system within which courts operate. Also, I remove from the table scenarios where trials are so overdetermined by politics that they can hardly be considered trials at all. A key objective of this paper is to delineate a narrower subset of judicial processes and circumstances that properly deserve the label of political trials. However, politics enter the legal world of trials in many different ways; for that reason, the following discussion expands to encompass trials with prearranged scripts where institutional risk has been eliminated. This paper also examines politicization in the context of Lawrence Douglas’s concept of “didactic legality” and the burgeoning literature on wrongful convictions. Clearly, miscarriages of justice – which may or may not add up to wrongful convictions – are the result when trials become political. This paper highlights this last concern by looking at terrorist trials as a particular subset of political trials, and then (more broadly) by comparing Cold War trials to both judicial and quasi-judicial processes in the current War on Terror.

Finally, a set of criteria for analyzing political trials is elaborated; this will further an understanding of trials as producing responses that are temporally emblematic, as microcosms of the specific political and cultural universe they seek to reproduce in concentrated legal form. It is not possible to arrive at a single definition of a political trial that encompasses the necessary levels of specificity and generality in a way that does not render the concept meaningless in application; it *is*, however, possible to look at political trials as inhabiting a continuum along which trials are more *or* less political. In this regard, when we are developing a set of factors for establishing whether

trials are political, no criterion ought to be singly determinative. This paper will conclude that the following criteria, when present, point to the politicization of justice. They also serve as potential markers of political trials:

1. There is an obvious political motive for prosecution.
2. The accused are political foes or regime adversaries.
3. In domestic trials, the charges are often not about “past acts” but also about the potential for future action.
4. The trial itself transcends its “normal” social role and is both ideologized and sensationalized by media and political elites as representative of a broader conflict, be it domestic or international.
5. Successful prosecution is an example of didactic legality – that is, the trial has a broader pedagogical function beyond the assessment of the guilt or innocence of a particular accused.
6. The trial is accompanied by widespread public fear.
7. There is a fixation on the confessions of the accused and on the suspicious circumstances regarding the manner in which they were obtained.
8. Secret evidence is often used.

None of these criteria are singularly determinative or regime specific. For that reason, this approach emphasizes the historical and political context of each trial as well as the facts of each particular case. That said, political trials are first and foremost *trials*, so a brief analysis of the multiple social roles of trials and of their susceptibility to politicization precedes the overall analysis.

THE ROLE OF TRIALS IN SOCIETY

Karl von Clausewitz popularized the notion that war is politics carried out by alternative means. Trials can be similarly understood as wars carried out by legal means. Over time and in accordance with differing cultural and religious norms and political practices, trials have been used as publicly accessible dispute resolution mechanisms. The word *litigation*, after all, comes from the Latin words *litis* and *ago*, combining the idea of contention and strife with the verb “to go.” The result is both active and aggressive — to go to struggle, to carry on with a dispute. Thus Alan Dershowitz (2004, xiv) likens trial lawyers to “gladiators facing off against each other in moral combat.” Historically, criminals – or “outlaws” –

were those members of society who had been expelled from the political community for breaking legally enforceable codes of conduct. Because of their egregious or unacceptable behaviour, they were cast as enemies. With the advent of the Westphalian state system, the monopoly of the legitimate use of force implicit in claims of sovereignty included a legal monopoly over the enforcement and adjudication of public law. Thus common law and civil courts developed a special kind of interpretive monopoly – which, however, was often contingent on both state capacity and constitutional forbearance. Legal rights cannot be realized nor legal prohibitions enforced without state involvement. In this broad sense, all legal institutions – courts most of all – are part of the political process writ large.

The institutionalization of courts and the public legitimacy accorded trials can be associated with the triumph of Weberian legal-rational authority; nonetheless, trials have retained an aura of pre-Enlightenment enchantment. Writing in the late 1940s, American appellate court justice Jerome Frank described trials as public repositories of legal “magic” wherein lawyers functioned as wizards practising their mysterious craft deep in the mist and swirl of legal rules and doctrines, under the tutelage of trial judges, who exercised extraordinary discretion, in itself a kind of “rule magic.” Trials, like religious rites, are complex social rituals involving special observances. They are conducted in accordance with canonical sets of rules. They are presided over by priestly castes that gain their position through apprenticeship and a particular education and that speak in specialized vocabularies which in turn generate differing interpretations. Like religions, trials have been subject to considerable contestation and have undergone various “reformations,” often in concert with other political and social reforms.

Trials are also public narratives par excellence, stories of societal and individual conflicts great and small, ritualized and state-sanctioned exercises in adversarial struggle. Trials educate, excite, and pontificate and are exhausting and compelling in equal measure. Trials have long been “reality” entertainment, because courtrooms provide a stage for the essential dramas of life, with the various players making their Shakespearian entrances and exits. They are both tragic and comic. They are routinized in the extreme, yet they

can generate outcomes with revolutionary consequences. Every historical age has had its momentous or emblematic trials that illustrate the conflicts and attitudes of an era. Dershowitz has written that trials provide a particular lens through which history is viewed – not a panoramic, slow-speed, or videographic perspective, but a rapid and representational one (*ibid.*, xiii). Some trials become part of popular culture and indeed transcend it:

In the historically significant trials of any era, more tends to be at stake than the lives, freedom, or fortunes of the litigants themselves. Great issues or events transcend the individual participants in the courtroom confrontation. Sometimes an important precedent is established. Other times, a prominent person or movement is made or broken. Often the verdict of history is determined, or influenced, by the verdict in the case, though sometimes the verdict of history and the outcome of the case may differ dramatically. Nearly always there is something about a memorable case that makes it somehow representative of the passions of its time. The most noteworthy of trials deal with enduring themes that transcend time and place. They reflect the human condition. (*ibid.*, xiv)

According to Robert A. Ferguson (2007, 2–3), in trials that generate intense coverage and public debate, three “interlocking catalysts” are at work: the spread of conflict beyond the indictment, the element of surprise or threat, and finally an inviting iconography in which symbolism and the imagery of personality take on a larger dimension.

Trials are also fundamentally shared experiences: they form part of our collective memory and are often foundational in terms of the requirements of historical or transitional justice. They symbolically signal the end of a regime and hopefully usher in a more “just” political system. However, this is usually a tall order, because it is rare that the characters on the stage can be neatly categorized as “heroes” and “villains,” “friends” and “enemies.” Trials provide the stage, but like all good theatre that reflects the reality of human life, the characters never sit easily with their assigned roles. Given their adversarial nature, trials specialize in binary constructions of good versus evil; yet when legal principles are applied to the facts of any case, the results yielded are much muddier. Where the rule of law is respected and the presumption of innocence is entrenched,

the legally innocent yet factually guilty perpetrator may go free on what journalists refer to as “a technicality.”

Given the *social* function of trials, it is hardly surprising that some trials appropriate the label of *political* trials. In the same way that “ordinary” trials do not exist in a vacuum, political trials, to be fully understood, must be seen in the context of the political culture they emblematically represent. Many of the earliest political trials began as exercises in political expediency; the political passions of the moment later surpassed the cool judgment of history. Think of the trials of Jesus, Socrates, and Joan of Arc. In revolutionary France, tribunals inside the overcrowded prisons of Paris took a reckless, ruthless, and highly improvisational approach to the dispensation of “justice,” amidst allegations and counter-allegations of treachery and conspiracy. Such trials were as much exercises in political leverage, in naming and shaming, as they were forums for reasoned deliberation. Punishing wrongdoers in political trials is not simply about erasing antisocial or criminal elements; it is also about countering political threats. An individual in a political trial often represents an idea, a group, or a movement that is viewed as dangerous and as ineradicable by legal means, though the trial may be one aspect of the broader arsenal available to authorities. At the same time, political trials allow for the public scrutiny of prosecution or persecution, for an open display of a regime’s adversaries and an acknowledgment of crimes admitted or alleged.²

In the twentieth century, political trials have crossed state boundaries to take on international dimensions.³ Indeed, some of the most didactically “successful” political trials have been international trials – most notably the International Military Tribunal (IMT) convened by the victorious Allies in Nuremberg immediately after

² The potential for politicization may also be a function of the trial system: for example, in continental systems there is a much greater degree of judicial involvement in defining the issues at stake and for deciding on matters of both fact and law than there is in Anglo-American systems. Indeed, this would be a fruitful topic for a combination of qualitative and quantitative analysis.

³ I assume here that international trials concerning war crimes and crimes against humanity are political trials, given the overall political context, the nature and purpose of the charges, and their inherent “didactic” or pedagogical function. International crimes include war crimes, crimes against humanity, genocide, torture, aggression, and (arguably) some extreme forms of terrorism, but do not include illicit traffic in drugs or arms. See Cassese (2004, 23-25).

the Second World War to try the Nazi leadership for war crimes and crimes against humanity. The IMT, which was followed by the Tokyo trials a year later in 1946, signalled a crucial turning point in international law: first, two new crimes were recognized (crimes against peace and crimes against humanity); and second, state representatives were called to account for their role in atrocities and could no longer hide behind the shield of state sovereignty.⁴ Decades later, in the post-Cold War era, the “Nuremberg principles” breathed new life into international trials when the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), following the civil wars, ethnic cleansing, and genocide in those two states. The resulting trials served many purposes: they punished those responsible; they drew a line between those who were politically incorrigible and those who were considered rehabilitable; they educated the current or the next generation; they created a historical record of wrongdoing; they deterred others; and they provided a source of legitimacy for subsequent leaders. Historians, diplomats, lawyers, and policy makers continue to argue whether trials can ever deliver on any or all of these expectations; but such trials proliferate nonetheless, as the surrounding controversy broadens.

Political trials are more likely when political conflict takes on multiple dimensions and several factors are in play: a contest of competing ideologies; military conflict or the heightened threat of it; and a climate of hysteria and widespread public fear, often stoked by the media, political elites, and those perceived as enemies. Political trials are often conducted within a cultural universe in which the state dominates and censors the arts and manipulates the media, limits or eliminates free speech, and restricts academic freedom and access to information, often for reasons of official secrecy or national security. Law enforcement agencies and prosecutors rely on informers and extracted confessions to obtain what today we call “actionable intelligence.” Unfortunately, confessions are often self-serving or false, leading to wrongful convictions. Moreover, such miscarriages of justice can be the result of unfair trials in which the accused are legally and/or factually innocent.

⁴ See Taylor (1992, esp. 1-55).

Nevertheless, the extraction of confessions and the uncovering of plots assume a cultural and pedagogical importance – so much so that guilt by association can be a dangerous by-product and resonate outside the courtroom in the cultural practices of dissociation, persecution, and the assignment of collective and ascriptive guilt.

One such era was the Cold War, when both sides of the East-West divide politicized justice as part of a broader ideological contest (and despite the glaring differences between the two systems). The current War on Terror has seen the replication of many of the hallmarks of the Cold War: the conflict is international in scope, ideological in nature, and fought on cultural, political, military, and legal terrain; furthermore, no obvious territorial conquest will “solve” the underlying causes. As a result of all this, trials, administrative proceedings, and quasi-judicial processes can become part of the conflict itself, as microcosms of the larger drama, all the while making their own cultural contribution – again, as a kind of “war” carried on by legal means.

During the Cold War it was possible to describe a number of key trials in both the East and the West as political trials, especially given that they were also exercises in education and legitimacy regarding what was politically permissible during the decades-long superpower conflict. Noteworthy prosecutions, such as the Smith Act trials, the Alger Hiss trial, and the Rosenberg-Sobell trial in the United States, as well as the Rajk and Slánský trials in Eastern Europe, shaped the domestic and international contours of the Cold War and became emblematic and representative dramas in their respective societies; the differences in the two systems in some ways underscore the broad similarities in these cultural endeavours. Key trials were high points in broader propaganda campaigns conducted by both the United States and the Soviet Union (and their representative satellites) in their efforts to win “hearts and minds” and simultaneously warn detractors or alleged and real conspirators of the dangers of dissent. Political trials were not simply about dispensing justice: they were elaborate exercises in legitimation, addressed to domestic and international publics alike.

Trials of this sort are lenses through which one can view the relationship between law and society; they are also broadly illustrative of the political regime and culture in which they are held.

Indeed, legal and political strategies combine in political trials to produce a localized, concentrated, and representative dramatization of the conflict at hand. Because conflict is “reduced” in a trial setting to a finite number of players and issues, the results are more publicly digestible, which adds to their didactic value. All the more striking, this is true not only in polities that reify and respect the rule of law (and that generally dismiss political provenance in “impartial” judgments) but also in polities that view trials as ritualistic and theatrical enterprises in confession, blame, and repentance.⁵ During the Cold War, both East and West engaged in opposing yet complementary processes of cultural formation; it is ironic that despite their efforts to differentiate themselves from each other, they developed comparable processes, strategies, and responses – political trials being but one example.

Political trials generate verdicts on the basis of evidence organized into a prosecutorial metanarrative. They shape and confirm assumptions of guilt or innocence in such a way that these reach beyond specific defendants to implicate entire classes of people as well as the ideas with which the defendants are identified. During the Cold War, trials were part and parcel of *raison d'état*, of the “grand strategy” of communist “containment” or socialist consolidation. Thus they could not be delinked from political demands or cloaked by any other name than politicized justice. To the extent that one can say there is a “grand strategy” in the current War on Terror, one key component is the clearly legal “war” – so much so that Anthony Lewis has referred to the “radical vision” of legal counsel to the Bush administration as *la trahison des avocats*.⁶ However, unlike the Cold War, this ideological and political conflict is currently

⁵ Compare the discussion of “legalism” by Shklar (1986) with the “theatrical” analysis of Soviet courts by Cassiday (2000). Cassiday persuasively argues that the Soviet trials of the 1930s – on which the Slánský and other postwar East European trials were modelled – were skillful exercises in the deliberate merger of theatre and justice, spectacle and ideology. She speaks not only to the intrusion of fiction into truth, but also to the long-standing relationship between drama and the law. This relationship preceded and succeeded the Cold War. The Scopes monkey trial (*State of Tennessee v. John T. Scopes*) and the Nuremberg trials were heavily dependent on drama, and such “reality justice” spectacles as the O.J. Simpson trial (*People v. Orenthal James Simpson*) and the Michael Jackson trial (*People v. Michael Jackson*) continue this tradition (see also Ferguson 2007).

⁶ See Lewis (2004, 4) on the Bush administration’s position on the applicability of the Geneva Conventions to “enemy combatants.” The larger concern is the deployment of highly contestable and policy-driven interpretations of domestic and international law to suit political or military objectives, sometimes under the rubric of “lawfare.”

being fought more directly through conventional military means. Though many features of the earlier Cold War trials – such as the importance of confessions, the use of secret evidence, and guilt by association – are clearly manifest, there have yet to be as many landmark trials that can be understood as social microcosms or passion plays of the broader conflict.⁷

However, understanding some trial dramas as intrinsically political, especially during eras of ongoing global conflict or internationally sponsored regime change, does not get us any closer to establishing a set of workable criteria for distinguishing political trials. For this, a detailed examination and analysis of influential texts and definitions must be undertaken.

POLITICAL TRIALS: THE CLASSIC DEFINITION

The classic work remains Otto Kirchheimer's *Political Justice* (1961). According to that text, political trials are those during which "the courts eliminate a political foe of the regime according to some prearranged rules" (ibid., 6). He sees courts as deployed by the state in an "ongoing fight for political domination," on a field of effective authority that includes parliaments and bureaucracies, the media, workplaces, the church, and the education system (ibid., 4). Parliaments and political executives typically wield much greater power in the making of policy and law; however, courts are at times of necessity drawn into clashes between governing authorities and their foes.⁸

⁷ The reasons are legion and some highly speculative. They range from the use of immigration and administrative law as a substitute for either the criminal sanction or national security law given weaker due process norms (differential evidentiary requirements and a lower burden of proof) through to the length of time it takes combined domestic and international security operations to investigate and conduct complicated surveillance and intelligence operations that result in actual arrests and trials.

⁸ Kirchheimer does not tell us what he means by "political foe"; however, one can easily infer that he is not talking about political adversaries who are loyal to the system, but rather those whose real or perceived activities and goals involve publicly challenging the fundamental basis of state authority *as defined by that state* (or, prior to the ascendancy of the Westphalian state, as defined by the established order of the realm). Thus there is no absolute definition of a "foe" – the label can only be understood relative to the regime type and the nature of its authority. However, he does clarify that either "internal deviants" or "foreign foes" can be considered *hostis generis humani*. Also, political foes are *public* foes, not *private* adversaries, though a particular regime may divide the public from the private sphere in such a way as to effectively "publicize" private disagreement.

In Kirchheimer's scheme there is a dialectical relationship between courts and what he loosely terms "authorities." States are usually careful to specify which kinds of quarrels with which foes ought to be submitted to courts. Increased risk, however, makes for decreased discretion. After all, there are other ways to eliminate political foes – examples include the ballot, the bullet, manipulation of the media, and cooptation of the individual or cause in question. Courts may be suspicious of anything encroaching on their prestige or independence, and that suspicion may be magnified when it is difficult to implement remedies. Moreover, courts have historically taken an abstemious attitude toward what they label as political questions (ibid., 4), and there exists "an inevitable danger [of] deformation through partiality of underlying assumptions and procedures" (ibid., 18). Put simply, politicians can lose control when matters are passed to the courts, and likewise, courts can be corrupted by political interference.

However, Kirchheimer maintains that judicial proceedings have a distinct advantage for both courts and politicians in that they simultaneously authenticate and limit political action (ibid., 6). By eliminating political foes, the system gains legal validation and so can governments and judiciaries. By agreeing to submit to the yardstick of the law, "those in power have as much to gain as their adversaries" (ibid.). Courts are a kind of "second line of defense" when the first lines – government and army – are too politically sensitive or obviously overcoercive (ibid., 15). Especially in the case of public and publicized trials, courtroom dynamics enable "the vicarious participation of a virtually unlimited public in the unfolding of political reality, re-created and severely compressed ... in categories within easy reach of understanding" (ibid., 7). Trials can be too risky or too blunt a policy instrument for exercising coercion and control; that said, the very limitations of time and space afforded by the courtroom promote a social concentration that enhances the narrative and legitimation potential of the proceedings. In short, political trials can be *useful* politically, pedagogically, and institutionally. As Lawrence Douglas later articulates, such trials have considerable "didactic value." Whether this is a good or a bad thing at the individual or systemic level depends on the particular facts of a given case as well as its broader political and historical context.

Examining the historical evolution of political trials, Kirchheimer observes that in the European experience of evolving constitutional monarchies, judges were less exemplars of impartiality and more “a kind of buffer between public opinion and the bureaucratic establishment” (ibid., 14) or “the arbiter between the official establishment and society at large” (ibid., 15). In his view, judiciaries continue to operate within a “margin of tolerance,” but this can be set internally “by its own interpretation of opinion trends and political and moral requirements,” or in an authoritarian system “by the commands of an identified sovereign” (ibid., 18). Writing in the midst of the Cold War, Kirchheimer was careful to note that for the Western judge, “opinion trends are reminders that, to be able to serve as norms of community behaviour, decisions must move within the penumbra of present-day contingencies,” whereas the “Eastern political functionary, on the other hand, develops the details of a political line regarding which a political command structure has established fixed yardsticks of responsibility for action taken or omitted” (ibid., 19). Though one is “opinion-directed” and the other “party-directed,” when involved in the business of eliminating political foes, one is no less political than the other – more sophisticated, subtle, limited yet effective, perhaps, but no less political.

Kirchheimer’s ecumenical approach, which is refreshingly devoid of Cold War ideology, casts the net wide enough to include arbitrarily directed state-run trials as well as trials conducted within the rule of law. He differentiates among judiciaries, the systems in which they are located, and the political trials that result, but he does not suggest that political trials are a particular defect of one system, or totally lacking in another. Furthermore, his parsimonious definition focuses on the internal logic of systems and on their use of rules to eliminate foes. Even where the rules are politically “fixed” to a greater degree, there is never a complete erasure of the application of the law. Rules still govern show trials, even though the truth-seeking function may be distorted or proscribed and the resulting justice mere window dressing that thinly veils the coercive apparatus of the state. The mirage of justice in the most egregiously unjust political trials can thus serve legitimacy and legality. And because trials concentrate legal processes in highly distilled form, they remain accessible to broader publics in ways that other expressions of legality are not.

Finally, in distinguishing political trials from ordinary trials, Kirchheimer notes a reversal of roles between the judge as trier of fact and the defendant. In an ordinary trial there is a natural tendency for the defendant (in a civil trial) or the accused (in a criminal trial) to present testimony in the best possible light, and the judge's actions are to some degree conditioned by that behaviour. In a political trial, however, testimony is adjusted in this way solely for tactical reasons – if the accused is truly a foe of the regime, his or her goal is to identify with the cause and thus put her- or himself in the worst possible light. Put another way, motive is all-important in a political trial, whereas an ordinary criminal accused only has to be proven to have committed all the prohibited elements of the offence (*actus reus*), with the appropriate awareness of having done so, that is, having possessed the requisite fault element (*mens rea*). For a committed political foe, there is no moral culpability, no *mens rea* in the traditional sense, yet motive is overwhelmingly important.⁹ Meanwhile, the judge is not troubled by the accused's testimony in terms of lack of culpability and is less conditioned to heed any degree of contrition (in any case unlikely from a political foe).

One key ambiguity in Kirchheimer's schema is his flexible approach to the loyal advocacy of political change, and the resulting problem of determining when acceptable opposition becomes dangerous subversion that must be judicially arbitrated. Given the historical sweep of his survey, however, such flexibility is arguably necessary. What is perceived as loyal opposition in one regime may be seen as a catastrophic undermining of political authority in another. He notes that from the deliberations of ancient Greece through to the eighteenth century, "offenses against the state were left in the most indeterminate form, encompassing whatever the power holders saw fit and were able to bring under it" (*ibid.*, 29). Issues of vagueness and overbreadth of the law aside, the express purpose is to create room for the state to manoeuvre in the labelling and to exercise discretion in the

⁹ It is noteworthy in the current War on Terror that new offences in many of the antiterrorism statutes are concerned with "criminalizing" motive as a means of both distinguishing terrorism and defining its essential elements. For example, the Canadian definition of "terrorist activity," borrowing from the approach of the United Kingdom, refers to actions that "in whole or in part for political, religious or ideological purpose, objective or cause ..."

prosecution of offences – a process he believes is not *necessarily* contrary to the rule of law. However, Kirchheimer’s focus on eliminating political foes places the emphasis on the adversaries and the offences rather than on the trial process itself. The trial is always the dependent variable. When we read the detailed historical examples that Kirchheimer provides of political trials in history, we find that the cases fit more into defining political *criminality* rather than giving the most fulsome explanation of political *trials*.

**POLITICAL TRIALS:
SEARCHING FOR DEFINITIONAL SPECIFICITY**

Writing ten years after Kirchheimer, Theodore L. Becker (1971) further delineated the meaning of political trials by means of a fourfold typology: (1) political trials; (2) political “trials,” (3) “political” trials, and (4) “political trials.” Each definition shifts the emphasis and degree of politicization. Becker is especially concerned about the pejorative connotation:

What actually rankles people about political trials are the connotations of deception or unfairness that attach to them – at the same time, there is not sufficient discrimination between dubiously nonpolitical trials, unfair trials, and dubiously non-political *and* unfair trials. Yet many Americans today are sophisticated enough to realize that governments resort to a wide variety of devices to hide their political motivations behind “routine” actions. And they have become cosmopolitan enough to recognize the many shabby facades, commonly called courts of law, which governments erect in order to assure a “proper” disposition of their enemies. For such reasons, writers frequently employ quotation marks, referring to this or that political trial, as a “political trial.” They are being noticeably skeptical about what is going on. (ibid., xiii)

In the first instance – political trials – following Kirchheimer, the crime is political as defined by the regime, and the trial is about the elimination of the political foe. Becker overcomes the “value neutrality” of Kirchheimer by suggesting that in this first category, the impartiality of the judge in applying the law is not at issue. (Recall that for Kirchheimer, the focus was on political criminality, and thus trials within or outside of the rule of law were a secondary feature.)

In the second type – political “trials” – the indictment remains political, and “the impartiality and the independence of the court is questionable at the very beginning of the proceedings” (ibid., xiv). The judicial system itself may be in question, or a single judge presiding over a particular case. Here Becker contrasts the trial of the Soviet writers Andrei Sinyavsky and Yuri Daniel, where the problem was system specific, with the infamous Chicago conspiracy trial, where a supposedly independent judge demonstrated considerable bias against both the defendants and their counsel, evidenced by his in-court statements and flagrantly prejudicial rulings. In the first case, acquittal was not realistically an option, given the party-directed nature of the Soviet judicial system. In the second, the trial procedures were a sham, and judicial independence was highly questionable, albeit not necessarily a characteristic of the system as a whole. Becker notes that in political “trials,” conviction tends to be inevitable at the lower court level.

In the third type – “political” trials – the charge itself may not be political in nature, but in any event it is subterfuge for the otherwise highly political aspects of the case (ibid., xv). Whether the charges are minor or major, prosecutorial discretion is deployed for essentially political ends. However, the trial may be “meticulously fair,” hence acquittal is possible – indeed, probable. Under this scenario, the courts serve as a bulwark against political motives on the part of the state.

Becker’s final category – “political trials” – involves the most pervasive politicization possible. Such events are both “political” trials and political “trials.” Becker views such trials as the “most reprehensible of the genre” because “they indicate that the system itself – and those who control it – is [sic] behaving dishonestly” (ibid., xv). Trumped-up charges are combined with a “simultaneous implosion of judiciousness” in the courtroom, and again, conviction is likely in the lower courts. However, Becker is careful to note that even in the case of “political trials,” the judicial system may or may not be thoroughly compromised; success at the appellate level remains a possibility. This depends both theoretically and practically on the regime type and on the specific historical and social context of the case at hand.

Writing contemporaneously with Becker, Nathan Hakman (1973) addresses what he views as the disciplinary myopia of political science with regard to political trials, especially in the United States. He perceives this lack of attention as a kind of willful blindness to the ways in which political trials have shaped American legal development,¹⁰ and to some degree as a consequence of the “end of ideology” era, during which left/right distinctions were seen as superfluous in the construction of a pure science of politics.¹¹

Following Becker and echoing Kirchheimer, Hakman wants to distinguish his argument about political trials from blunter claims that “the bias of pluralism makes judges, and almost all segments of the professional bar, integral parts of an ‘oppressive’ legal order” (ibid., 77).¹² He takes an expansive view of trials, situating them not just in the courtroom but also in their broader social and political context. Deliberately or not, courts specifically and the law more broadly can be seen as “(1) an instrument for securing private and personal remedies; or (2) an instrument for changing legal symbols (i.e., applicable rules of law); or (3) a means of organizing and/or suppressing movements for social and economic power and control” (ibid., 81). He sees “litigation politics” residing in all three cases: “No matter how personal or private a specific legal dispute appears to be, one observer or another can ‘find’ the existence of larger ‘public’ interests lurking in the background” (ibid., 84).

¹⁰ For example, Hakman cites the “ideological trials” involving the Berrigan brothers, the Harrisburg Pentagon Conspiracy Case, the Chicago and Seattle conspiracy trials, the hundreds of Black Panther Party cases, and the Angela Davis trial (pending at the time), as well as the earlier Alien and Sedition cases, the “Rosenberg espionage case” (sic; Julius and Ethel Rosenberg and co-defendant Morton Sobell were convicted of conspiracy, not espionage), the Communist Party leadership trial *Dennis v. United States*, and the much earlier cases of Sacco and Vanzetti, Tom Mooney, the IWW (International Workers of the World, or “Wobblies”), and the Socialist Party leaders during the First World War.

¹¹ The “end of ideology” debate was a prominent analytical trope in political science in the late 1950s and 1960s, especially in the United States, following Daniel Bell’s controversial assertion that the discipline had reached an end of ideology, where left/right distinctions were no longer relevant. For a review of the debate that clearly influenced Hakman, see Waxman (1969). For a retrospective account, see Bell (1988).

¹² According to Hakman, this view sees political strategies and tactics about law reform – very popular at the time – as meaningless exercises in “procedural liberalism” that were “essentially futile as techniques for securing fundamental social and economic changes” (Hakman 1971, 77-78).

In Hakman's view, there are three perspectives on "litigation politics." (1) From a "traditional" legal perspective, the dispute is between the parties, and immediate outcomes affect only them directly. Legislative reality is applied to adjudicative facts, and the courtroom is a black box sealed off from the outside world, immune from political agitation, pressure, or any other "social and economic theories formulated outside the courtroom" (ibid., 86). (2) From a "public interest" or "group" perspective, judicial proceedings are contextualized "as part of a larger stream of activity carried on by groups, classes, and individual litigants"; however, there are serious procedural limitations within the law that "politicize" such proceedings (ibid., 87).¹³ (3) Finally, Hakman expounds what he calls an "ideological" or "movement" perspective. He posits that in the late 1960s and early 1970s, a "people's law" developed that was closely linked to the social movement politics of those years, wherein ideological commitments were tested and advanced by way of recourse to the legal process.

Hakman's typology of "ideological political trials" takes these movement politics into account: "ideologically or structurally oriented litigants do not press their grievances against individuals or particular policies"; rather, "they confront the entire institution and its way of doing things" (ibid., 94). Such litigants are highly politicized and consider themselves the structural "victims" of "social and economic pathologies" that are inherent in the system – thus the system itself must be attacked, and the law and the courtroom are two of the "weapons" to be used in the offensive (ibid., 93). The quintessential American example cited by Hakman is Clarence Darrow's virtuoso courtroom performance in *Scopes*, where neither John Scopes's legal right to teach evolution in the

¹³ In this context, Hakman lists possible "indices of politicization" at the trial stage as including class actions; the use of expert testimony; amicus curiae; the process of controlling or "perfecting" a record; various kinds of financial assistance, sponsorship, or control of "principled" litigants; the strategic coordination of litigation to further political ends (especially in looking for a favourable appellate ruling or reversal); creating an "appropriate legal climate" by flooding law journals with "policy positions similar to that of the group sponsor"; developing like-minded networks of cooperating attorneys. All of these contribute to "securing" political payoffs, be they favourable rulings from courts or administrative tribunals, and/or increasing visibility and access for client interests (defined politically) at each stage of the judicial process (Hakman 1973, 86-93).

classroom nor the opportunity to face off against William Jennings Bryan were *really* the key issues. Rather, the courtroom proceedings were the vehicle through which Darrow was able to mount an attack, on behalf of the American Civil Liberties Union (ACLU), on the religious fundamentalism of his day.¹⁴

Hakman's approach suggests a positive commitment to political trials as part of a progressive movement politics, a type of struggle, very much in keeping with American legal and political traditions. Particular situations are suited to ideological litigation:

1. acts attributed to agents of foreign governments, or foreign conspiracies;
2. "politically inspired" arrests or "frameups";
3. "moral" acts of resistance or civil disobedience;
4. "constructive" Political Crimes (ibid., 96).

In the first two categories, the state is proactive in pursuing and prosecuting political criminals. Here, though, Hakman distinguishes situations where foreign or American nationals are alleged to be agents of other governments, from those where American nationals or domestic social and economic organizations (usually seen as dangerously radical or seditious) are allegedly linked to foreign or domestic conspiracies (ibid., 97). However, further politicization – not always successful – can happen at the instigation of the defendants. Thus Julius and Ethel Rosenberg were tried for conspiracy and were widely seen as agents of the Soviet Union; yet both the accused and their supporters portrayed the case in terms of civil liberties violations and as a form of deterrence/threat against those who opposed American involvement in the Korean War.

Hakman argues that political frame-ups vary with the veracity of public officials claiming the violation of law and the degree of infiltration, provocation, and social victimization of the group/individuals in question. In the latter two categories, the defendants are the proactive litigants. Some "moral" acts of civil disobedience (strikes, picketing, boycotts) may be legal in some circumstances

¹⁴ For brief accounts of Scopes and the "real" issues at stake, see Kadri (2005, esp. 279-84) and Ferguson (2007).

but not in others; others (“tax strikes,” draft dodging, willingness to engage in politically targeted burnings, bombings, and property destruction) may be manifestly illegal but engaged in to invite prosecution, to challenge institutional “oppression,” and to dramatize and energize a cause. Finally, some trials are politicized because the accused are too “alienated” to perceive their crimes as having a latent political character; these accused have no previous connection to or sympathy with movements. “Crimes” of this sort – for example, prison or race riots – are often unorganized or spontaneous but reflect systemic political grievances. The resulting trials are then ex post facto “reconstructed” as political trials.

JUDITH SHKLAR’S LEGALISM AND POLITICAL TRIALS

Hakman was echoing at a practical level what had already been explored at a more rigorously theoretical level by Judith Shklar in her controversial 1964 study, *Legalism: Law, Morals, and Political Trials*. Shklar boldly and simply defines legalism as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules” (Shklar 1986, 1). However, she views legalism as an ideology in two different but overlapping senses: first, as an ideology internal to the legal profession, and second, as political ideology that holds key values sacrosanct, such as the rule of law, the creation of reciprocal relationships based on correlative duties and rights, a view of equal rights as the implementation of moral rules, and the necessity of impartial and independent judgment when disputes arise.¹⁵

Shklar’s legalism is the professional albeit often unarticulated ideology of the legal caste. Essential to this ideology is a view of the law as simply “there,” rather than part of a social continuum or expressive of a particular political order. The rule-making and enforcement capacities of law increase its sense of itself as divorced from the social and political fray. Indeed, law’s predisposition to the construction – even “discovery” – of laws, to their rational and hierarchical ordering, and to reasoned adjudication based on legal

¹⁵ Ideology, for Shklar, refers to systems of more or less comprehensive political preferences – not necessarily internally contradictory, nor of a grand, sweeping, or teleological character (as in the “isms” of the twentieth century). Ideology is not necessarily transparent, nor can it be delimited as either rational or irrational.

principles, is the direct counterpoint to the arbitrariness, messiness, and expediency of politics. The predictable permanence that laws promote requires stability, social conservatism, a glacial slowness (presented as concern for consensus), and reliance on the established and expected (*ibid.*, 10). For Shklar, analyzing legalism does not require an “unmasking” of specific class or economic interests (as described by Hakman); rather, law is openly, behaviourally, and intrinsically conservative for all the reasons listed above. It follows from her description of legalism that she is deeply concerned about the delusory promise of legal formalism, especially legal positivism. She does not accept the analytical separation of law from morals, or the dichotomy of private morality (which is not practically subject to legal sanction) and public morality (which is coextensive with law as a system of sanctioned norms (*ibid.*, 39–55)).

This theoretical background is critical to understanding how Shklar approaches the relationship between law and politics in political trials. In her discussion of natural law and legal positivism, she notes approvingly the proper placement or displacement of morals. In her “legalism,” politics must be kept apart from the ideological edifice, both in theory *and* in practice. According to this rationale, “law aims at justice, while politics looks only to expediency” (*ibid.*, 111). Justice, as the cardinal virtue of legalism, is reduced to the systemic “commitment to obeying rules, to respecting rights, to accepting obligations under a system of principles” (*ibid.*, 113). Justice becomes a self-fulfilling tautology – it is the pursuit of impartiality and the exercise of fair-mindedness and self-control to curb prejudice, and it is curiously devoid of specific content, an “ought” without an “is.” Giving justice content means defining it politically – that is, filling up the vessel of justice with either freedom, defined as “the possibility to press social claims and interests,” or equality, meaning social egalitarianism (*ibid.*, 119). Political trials, for Shklar, illustrate how the apparent policy concern with justice in the legalistic sense can bump up against different politically motivated definitions of justice, for such trials “reveal the intellectual rigidities and unrealities of legalism as no other occasion can” (*ibid.*, 112).

In making the argument that politics is an escapable part of law because justice is a policy choice, Shklar is careful to avoid charges

of “Vyshinskyism.”¹⁶ Saying that law serves ends that are ultimately political and not contained within a self-referential legal universe is clearly not the same as suggesting that law is a crude instrument of the ruling class or of totalitarian domination. She can be read here as suggesting that the “high” politics of justice as a policy choice (system-determinative politics) are not the same as “low” politics (tactical decisions to support the system), which require that due process be eliminated in order to serve a calculated political end in which all risk has been eliminated in advance.

This argument plays out in her discussion of political trials. Given her argument that law is a form and reflection of politics, it is not surprising that she sees trials as political as well: “A trial, the supreme legalistic act, like all political acts, does not take place in a vacuum. It is part of a whole complex of other institutions, habits, and beliefs. A trial within a constitutional government is not like a trial in a state of near-anarchy, or in a totalitarian order. Law, in short, is politics, but not every form of politics is legalistic” (ibid., 144).

The answer to this conundrum is context. Not all political trials are political in the same way, and looking at the prosecutorial regime in question will shed further light on how this can be said to be the case. The Vyshinskyian political trial is an abomination of due process – indeed, its polar opposite. It is not the aberration of form and perversion of procedure that is the major problem but the political system it serves: “It is not the political trial itself but the situation in which it takes place and the ends that it serves which matter. It is the quality of the politics pursued in them that distinguishes one political trial from another” (ibid., 145). That the “high politics” of dictatorship require simultaneous persecution and prosecution “is the real horror, not the fact that courts are used to give it effect” (ibid., 145).

¹⁶ Shklar is referring to the legendary Soviet prosecutor Andrei Vyshinsky. In 1936 and 1937 he presided over the famous Moscow show trials of Gregory Zinoviev, Lev Kamenev, and (later) Nikolai Bukharin (and their many co-defendants). All three were comrades of Lenin and heroes of the October Revolution, but also archrivals that Stalin sought to eliminate by “legal” means and, eventually, by execution. These political trials, which were broadly rehearsed, hinged on the public confessions of the defendants. The same methods would be utilized in the postwar East European trials; in the latter, Soviet “advisers” were deeply implicated in the extraction of confessions, the orchestration of charges, and the ensuing frenzy of mutual implication and denunciation.

Given that context does much to determine normative distinctions, political trials are not bad in and of themselves; their assessment depends on the ends served and the system in which they take place. Thus Shklar uses Nuremberg as an example of a classic political trial that served liberal ends because of its implicit promotion of legalistic values to undergird future constitutional politics.¹⁷ In this sense, the IMT was the progenitor of the postwar German state, even more so than the Basic Law (*Grundgesetz*) of 1949. Significantly, this was also a new type of political trial, as it was multinational in nature, with the four victorious Allied nations collectively negotiating the charges contained in the indictment, establishing which Nazi military and civil leaders would be tried, sharing prosecutorial duties, and sitting together in judgment.

The IMT brings Shklar full circle back to her original argument – that legalism is a political ideology with considerable utilitarian and normative value because it promotes binding rules, logical deduction, adversarial argument, and fair process. Yet it is not simply law that helps us distinguish between one kind of political trial and another; law, in this context, is a *form* of “legalistic politics”:

If one thinks in terms of legalistic politics rather than of law and non-law, one can also recognize that there are trials to which legalistic standards are totally inapplicable because none of those participating in them have the slightest use for legalism. This was certainly the case in the Moscow Trials and their subsequent counterparts, as well as the various Nazi and Soviet “people’s courts.” What occurs in the course of these proceedings has nothing to do with justice. Their end is elimination, terror, propaganda, and re-education. In terms of these ends they may or may not be effective. They are part of regimes that have already

¹⁷ The Nuremberg trials succeeded for much the same reasons that the Tokyo trials did not (as much). Unlike Germany, Japan lacked a long legalistic tradition. Thus the case against the Japanese leaders was cast in terms of natural law, which lent the Tokyo trials an air of “national partiality.” Also, there was no grand “restorative” political strategy as in Germany, for in Japan the situation demanded the external imposition of a completely new kind of regime. Moreover, trials could not serve as ethical-religious, cultural-aesthetic, or literary-dramatic reference points for Japanese citizens and their leaders the way they could in the West; indeed, the war in the Pacific was cast by many as an anticolonial conflict (Shklar 1986, 179-90). Indian Justice Radhabinhod Pal wrote a scathing dissent against the majority judgment in the Tokyo trials, arguing that they were essentially exercises in the victor’s justice (Piccigallo 1979, 30-31).

abandoned justice as a policy, and our judgment of these courts must depend on our view of the ends they serve, not of their “betrayal” of justice, since the ideologies which inspire them are profoundly unlegalistic and indeed hostile to the whole policy of justice. From a liberal point of view it is the repressive character of these regimes that matters; from a legalistic view it is their rejection of legal justice. In either case, it is not the trials particularly, but the entire structure of such governments, that is objectionable. (*ibid.*, 147–48)

Again, by casting the trial in the context of legalism and specific regimes (i.e., the law is either “there” or “not there”), one escapes a difficulty – specifically, one avoids having to think about “degrees of legalism in the politics of complex social orders” (*ibid.*, 148). Shklar posits three ways of thinking about a political trial: (1) as a trial no more and no less, that is, as an act of pure legalism; (2) as more or less fulfilling the requisites of legalism as an ideology depending on time, place, and regime type; and (3) as a legalistic means for destroying or disgracing a political opponent (*ibid.*, 149).

Furthermore, Shklar allows that the IMT was a positive and liberal political trial, unlike political show trials, which are part and parcel of “perpetual purges” that turn the principle of legality upside down. Here, she cites Goebbels’s dictum that “trials should not begin with the idea of law, but with the idea that this man must go” (*ibid.*, 149). Like Kirchheimer, she sees the primary focus of such political trials as the elimination of political foes; however, she does not address this in terms of value neutrality. Given her second sense of political trial, one can conceive of political trials that function in accordance with the principles of fairness and due process, but which nonetheless are about eliminating political opponents. From her perspective, concerns about political trials should focus on more than trial fairness; they should also consider whether the broader policy of persecution endangers freedom, in support of which the fundamental value of protecting a tolerant society must be kept uppermost in mind (*ibid.*, 151). Her concern for the fundamental protection of liberal values, given the absolute victory of the Allies following the Second World War and the political hysteria that marked the Cold War, is echoed in more recent analyses of the Global War on Terror by Kent Roach, Gary Trotter, David Cole, and Ronald Dworkin (see below).

Shklar's examination of the Nuremberg trials demonstrates how hard it is to defend political trials solely on the basis of the ideology of legalism. The principal of legality demands that there be no crime without law – *nullem crimen sine lege*. Strict adherence to legalism would have placed the Allied prosecutors in a difficult box, given that there was no law prohibiting crimes against humanity – indeed, the charge was invented *ex post facto*.¹⁸ There are obvious difficulties with allowing the invention of charges, or constructively interpreting either domestic or international law with the goal of making it simpler to eliminate political enemies. Ultimately, the solution was political to the core, from the creation of the charge of crimes against humanity (as crimes that “shocked the conscience of humanity”) through to the negotiated interpretation of the charges themselves. The situation *required* a legalistic means of eliminating the Nazi leadership, if only to intercept acts of revenge and replace a culture of impunity with one of accountability. Historically and at present, political trials, like criminal trials, must replace vengeance with a process conceived in legalistic terms: demands for legitimacy must replace demands for expediency.

Why, then, was Nuremberg accepted as “just,” given that legalism alone could not justify its existence? Shklar has several answers. First, “the accused were not being eliminated on vague or false charges” (*ibid.*, 157). Second, beliefs or future acts were not at stake, and there “was no room for speculation about mental states or potential future behaviour” (*ibid.*, 158). Here, Justice Robert Jackson's decision to base the trial on documentary evidence provided by the Nazis themselves was of critical strategic importance – because, though the charges were retrospectively applied, it was patently clear to all participants that the events in question *had already taken place* and that “something deserving punishment had been done” (*ibid.*, 168).¹⁹ Third, the trial process was considered

¹⁸ Shklar cites the debate among Allied representatives – both prosecutors and members of the tribunal – concerning the charges and their interpretation. War crimes were the “soundest” charge, echoing the Hague Convention of 1907; the crime of waging aggressive war and crimes against humanity were novel. Nonetheless, even the French IMT member, Donnedieu de Vabres, conceded that the principles of legality and *nullem crimen sine lege* did not apply because the non-retroactivity only applied to “an established legal system within a civilized and stable political order” (Shklar 1986, 162). See also Marrus (1997) and Douglas (2001, esp. 38-64). For a detailed discussion of how the Allies came to an agreement on the charges contained in the indictment, see Taylor (1992, esp. 55-77).

¹⁹ The Nazis' meticulous preservation of records helped Jackson considerably; thus it was both a strategic and a practical choice.

internally fair, both at the time and by the judgment of history. Each defendant was individually charged and had counsel of choice, and rules of procedure and evidence were followed. Fourth, the verdicts themselves were not preprogrammed; the fact that two were acquitted and several acquitted of one or more charges helped assuage contemporary concerns about “victor’s justice.” Finally, the trial worked *politically* because the legalistic framework employed had deep roots in modern Germany.

Given Shklar’s arguments about legalism as an ideology, her approach suggests that political trials also have an educative function with respect to instilling the values of that ideology. In the case of the IMT, in the aftermath of the trial, West Germany was established as a *Rechtstaat*, and her requirement that the values of a tolerant and pluralistic society be respected was clearly met. An approach based on military executions of leaders, or some enforced program of re-education combined with wide-scale administrative purges, may not have achieved the same results.²⁰ The trials were also educational in that they constructed a historic narrative and generated support for particular public policies. Indeed, Shklar underscores Justice Jackson’s specific political concerns: (1) that German illegal aggression be established both for the historic record and to reinforce the morality and legality of the American position on neutrality and Roosevelt’s lend-lease program; (2) that ordinary Americans share in the trial experience and thus be sufficiently well informed that postwar arguments against isolationist foreign policy would be easier to make (a danger not prevented after the First World War, when the United States refused to join the League of Nations); and (3) that the trial itself serve as a catalyst for the further codification of international law (*ibid.*, 173–79).

Shklar spends much less time on domestic political trials, which are far more common. Predictably, she casts the logic of

²⁰ The “options” available in the international toolkit with respect to transitional or historical justice were certainly limited in 1945. In the post-Cold War era, there have been many other alternatives on which to draw – for example, truth and reconciliation commissions (Chile, Guatemala, South Africa), programs of lustration (the Czech Republic, Slovakia, Poland, Romania), and selective or restricted access to secret police files (Germany, Hungary), as well as international ad hoc tribunals (ICTY and ICTR) and, more recently, the International Criminal Court (ICC).

legalism and her assessment of the normative value of political trials as ultimately dependent on the kind of politics being promoted: “The political trials of totalitarian regimes are outrageous not because they are political, but because they promote reprehensible politics” (ibid., 211). This, however, is an incomplete analysis: “totalitarian” or show trials, which she earlier refers to as “Vyshinskyism,” are both “political” trials and political “trials,” as per Becker’s categorization. This is an oversight, because (1) she previously condemned Vyshinskyism as the polar opposite of due process,²¹ and (2) given her discussion of conspiracy as a politically motivated charge, she is equally concerned with an obvious deficiency of legalism (and especially *mens rea*), whatever the lip service paid to trial form:

Any political trial in its search for *mens rea*, where none often exists, will present the past in conspiratorial terms. The Moscow trials, however, were only one manifestation among many others of a general obsession with conspiracy. As was noted, the trial as a whole did not revolve about any question of historic responsibility, but was limited to simple criminal charges and patterns of argument. The interplay between the “subjective” and the “objective” meaning of various acts was used occasionally to confuse the accused. In the postwar trials of Rajk and Slansky, even the occasional use of this sophistry was abandoned, as the charges of conspiracy and espionage became more comprehensive as well. What gives the real sense of conspiracy to these trials, and to the politics of which they are a part, is the reduction of history to a radical either-or. Either one is for us or against us, and those against us are a vast and ubiquitous conspiracy. (ibid., 205)

That she identifies the problematic nature of conspiracy charges in her analyses of the IMT, yet does not address this issue in her brief discussion of domestic political trials, is both surprising and disappointing. Instead, in her analysis of domestic political trials in the United States, she focuses on whether there is ever sufficient justificatory politics “for the coercive elimination of political enemies” in what amounts to “a selective domestic war” (ibid., 210). The answer essentially turns on an assessment of “the danger

²¹ Moreover, in her analysis of the IMT, she notes that one of the hallmarks of its overall “success” was the attention paid to due process and trial fairness.

presented by politically obnoxious and anticonstitutional groups, the degree of horror they inspire, and the extent to which one fears that the persecution of a few may end up restricting the freedom of all” (ibid.). Here she enunciates an early version of the “liberty versus security” trade-off, and her cautionary approach suggests a stringent requirement of justification to “compensate for the loss of liberal values” (ibid.).

According to Shklar, in the postwar era only three American trials could be “even partially” regarded as political trials: the second Alger Hiss trial, the Rosenberg-Sobell trial, and the *Dennis* cases. For Hiss, the Rosenbergs and Sobell, and the leaders of the Communist Party of the United States (CPUSA), the Cold War atmosphere both heightened and coloured the proceedings. Moreover, the defendants were proxies for broader political issues that were arguably under prosecution: for Hiss, the New Deal and the progressive policies of the State Department; for the Rosenbergs and Sobell, the Korean War and the Soviets’ ability to test and build atomic weapons much earlier than had been anticipated; and for the CPUSA leadership, the destabilizing spectre of world communism. Shklar suggests that none were “classical” political trials, “with all the indifference to the actual deeds of the accused which that involves” (ibid., 211). However, again Shklar is inconsistent in her comparison of international and domestic political trials, for the IMT was surely not indifferent to the deeds of the accused. More disturbing is her argument that a key reason for the “partial” classification of the Rosenberg-Sobell trial was the very criminal “ordinariness” of the charge of espionage. This is especially troubling given that Julius and Ethel Rosenberg and Morton Sobell had been charged with conspiracy to commit espionage, not espionage; thus her generic concerns about conspiracy charges ought to have come to the fore.

Shklar’s analysis of *Dennis* is better grounded. Here the elimination of political enemies – in this case, *potential* political enemies – was *the* central issue. From the perspective of American constitutional politics, the communist defendants were denied First Amendment protection given their subversion, yet Shklar maintains that they were *not* held to the “crudest form of historical responsibility” – that is, held guilty for what they had not yet done, which was overthrow

the government of the United States by revolutionary means (ibid., 214). Nonetheless, there are direct parallels with the Vyshinskyism of the 1930s Moscow trials, as well as the postwar trials of Rajk and Slánsky. As with the East European defendants, the CPUSA leaders were guilty for what had not yet happened; indeed, their “objective” guilt as communists made it more likely *that it would happen*. Shklar does not make this parallel explicit, yet it is inherent in the logic of her analysis. “Subjective” guilt – that is, individual responsibility proven beyond a reasonable doubt, where the accused has committed all the elements of the *actus reus* with the requisite *mens rea* – is denied in the reconstruction of the “clear and present danger” test by Judge Learned Hand.²² Both Justice Frankfurter and Judge Hand were deferential to the policy aims of Congress and the protection of national defence, and here Shklar is blistering in her attack, suggesting that “there is no reason to suppose that any persecutive measure should ever be regarded as unconstitutional” (ibid., 216).

Meanwhile, Justice Jackson, the prosecutorial hero of Nuremberg, had little difficulty inserting the CPUSA defendants into the law of criminal conspiracy, though he voiced his concern that political trials meant “committing the judiciary to the politics of the remote future and of persecution” (ibid., 219). The conservatism of the court in its accommodation to political demands could have prompted Shklar to levy the same charge of legalism – in the guise of legal positivism – that she hurled at the German courts for supporting and upholding the dictates of Nazism, but again Shklar shies away from pushing the analysis in this direction. Nonetheless, she does presciently argue that, even if judiciaries ought to be muted in time of war, a conflict such as the Cold War should *not* require an abandonment of the

²² This was the operational constitutional test for subversive speech, which provided that the First Amendment guarantee of free speech could only be subject to government prohibition when the speech at issue posed a “clear and present danger.” At the appellate level in application to the *Dennis* defendants, Judge Learned Hand famously interpreted the test as a balancing inquiry, pitting the “gravity of evil” (and the probability of its occurrence) against the effect of restricting free speech. The Supreme Court adopted Hand’s interpretation and upheld the convictions, even though there was no concrete evidence pointing to any CPUSA plans for the actual overthrow of the U.S. government. Indeed, the case was so weak that the government developed an elaborate “Aesopian language” thesis, suggesting that surface pronouncements and party positions inevitably held deeper meanings, illuminated by an inherent ideological commitment to world revolution.

principles of legality or liberalism, conjured up by excessive paranoia associated with an interminable and indefinite conflict (ibid., 219).

Shklar concludes by stating that domestic political trials, conceived as trials for eliminating political foes, can only be “destructive devices” in liberal and constitutional polities. However, she insists that a contrary approach is necessary in the international arena: “Where there is no established law and order, in a political vacuum, political trials may be both unavoidable and constructive” (ibid., 220). In the end, she adds the political ideology of legalism to our discussion of political trials while retaining Kirchheimer’s definition of eliminating political foes. Her approach allows for a normative assessment of political trials as either positively reinforcing or negating the principles of legalism. Such trials (including the IMT) may have broader political purposes – for example, to re-establish a legal order, to inculcate the values of legalism, or to produce an educational narrative about the past. However, her analysis of domestic political trials such as *Dennis et al. v. the United States* is contradictory and incomplete. She avoids crude reductionism whereby political trials serve merely to reinforce and reflect the ruling apparatus of a coercive state, but she does not allow for a specific categorization of trials. Furthermore, though she loosely establishes that certain criteria (protecting tolerance, maintaining political freedom) must be respected for “successful” international political trials, she does not extend this logic. Thus, as does Hakman, she categorically rejects the possibility of an effective and positive domestic political trial at the domestic level – whether the trial’s purpose is to heighten conflict or to diffuse it.

POLITICAL TRIALS: RONALD CHRISTENSON’S TYPOLOGY

A more recent effort to categorize political trials has been made by Ronald Christenson (1983, 1986, 1991). He argues that all political trials have *something* irreducible in common, and that they can make “a positive contribution to an open and democratic society” (1989, 3). For both good and ill, they “bring together for

public consideration society's basic contradictions, through an examination of competing values and loyalties" (ibid.). He contends that political trials are creative social experiences that clarify and crystallize basic societal dilemmas. They are, after all, trials, and as such they "are, first and foremost, stories" (ibid., 7). Trials are concentrated narratives, during which the law emerges out of a "tangled maze of stories" (ibid.). Lawyers and law students often set aside the story of a trial in order to distill the principle or the holding; yet in political trials especially, the story itself is as important as the outcome. For Christenson, political trials are a special kind of story: they "shape our thinking of the dilemmas of law, influence our sense of justice, and change our morality. They do more. They provide society with a crucible for defining and refining its identity. These are the political trials. They are less useful for lawyers to build their cases upon than they are as the common possession for all society to use in clarifying what it stands for and why" (ibid.).

Political trials, then, are less important for their rules and precedents than for their stories. Indeed, when reduced to precedent, decision, or holding, they are often misleading. Moreover, certain political trials tell stories of such consequence that "society's common understanding of basic issues of politics derives from them," and they can result in changes to the rules of law themselves, as collective understanding is revised by such stories (ibid., 8).²³ In this sense, trials are teachers: they compel an examination of fundamental values, and they contain and portray the conflicts of a particular generation, time, and place. Christenson suggests that political trials are like Gordian knots in the law: "While a court may cut through the issues with a rule in a sharp decision – the defendant may be convicted or acquitted – the dilemmas of responsibility, morality, representation, or legitimacy remain" (ibid., 9). Political trials can highlight a particular dilemma through a particular set of facts; but regardless of the decision, the story continues and the broader dilemma is rarely "solved."

²³ In so doing, Christenson amends H.L.A. Hart's definition of law as the union of primary and secondary rules, the first providing obligation and the second correcting for uncertainty. Christenson (1989, 8) argues that "law is the union of primary stories and secondary rules." Political trials, especially those of world historic importance, are among these primary stories.

Christenson asserts that efforts to *define* political trials, however laudable, are ultimately unsatisfying because such definitions become “mired in the quicksand of motive.” Motives are always too varied and contradictory to assist in attempts at categorization. In the final analysis, law and politics are about reliance on judgment. When these are abjured or altered by considerations of motive, Christenson suggests, “we will land either in the cynical position that law is the will of the stronger and therefore all trials are political, or in the naive, Panglossian position that none are” (ibid., 4). Furthermore, political trials are often seen either as miscarriages of justice, where “heroes [are] unjustly prosecuted,” or as understandable and even-handed judgments from differing political perspectives (1983, 547). Christenson too easily dismisses motive in determining whether trials are in fact political; in part, this is because his focus is on categorizing them.

Christenson offers a typology of political trials throughout history (see Table 1). First, he distinguishes between “partisan trials” that “carry the stamp of despotism” and that are not supported by law, and trials conducted within the rule of law (or, as Shklar would say, by the ideology of legalism) and that presume equality before the law (Christenson 1989, 10). In each of these two broad categories, one can find four subsets of trials: (1) trials of corruption, (2) trials of dissent, (3) trials of nationalists, and (4) trials of regimes.²⁴ Like Shklar, he maintains that trials have dual legal and political agendas; with partisan trials, however, the legality is a facade and politics dominate. Furthermore, the four types of trials in each category are organized as questions and responses to basic issues of politics; each encapsulates a particular dilemma (ibid., 9–10). Thus, corruption trials focus on the nature of public responsibility and challenge the distinction and appropriate “border” between the public and private spheres. Trials of dissenters examine *raison d’état*, the moral and political correctness of public policy, and the appropriate deployment of state power.

²⁴ Christenson deliberately follows Aristotle’s famous classificatory scheme of “right” versus “wrong” constitutions, which divides politics according to whether governance is guided by the common good or in the interests of the rulers alone. Thus his typology of trials considers either the common good (expressed by the rule of law and basic equality before the law) or the interests of the rulers (expressed as partisan advantage). Again following the methodology of Aristotle’s *Politics* (1980) each of his four categories, there is a “good” version and a “perversion” of a political trial.

TABLE 1
Types of Political Trials

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

Source: Christenson (1983, 555). Reprinted by special permission of Northwestern University School of Law, *The Journal of Criminal Law and Criminology*.

Also at issue are methods of dissent and how they are construed as legal or illegal, and if the former, whether they are morally or politically justifiable nonetheless. Trials of nationalists analyze the nature of authentic political representation and force participants to examine the claims of national minorities (sometimes, indeed, majorities) who are not represented, or who are using trials as a platform for seeking independence. Finally, trials of regimes question the basic legitimacy of the exercise of power in a given state. Such processes can effectively place current or former regimes on trial. As we move up the scale from the first level to the fourth, we find that political trials are less common but increasingly more serious, finally culminating in a questioning of the legitimate exercise of power. This escalation places courts specifically, the law more broadly, and the political order as a whole in increasing difficulty: “Each type presents a Gordian knot tied successively tighter” (ibid., 11).²⁵

A further problem is the difficulty imagining – be it theoretically or practically – a neat and clean dividing line between partisan trials and those conducted under the rule of law. Christenson tells us that in his typology, partisan trials “carry the stamp of despotism, while

²⁵ Though Christenson (1989, 8) wants his typology to work across the entire “landscape of history,” his study is largely concerned with trials in the Western tradition. This makes sense given that, in the West, law and legal institutions developed both in tandem with and apart from other branches of government and other institutions in civil society. Moreover, the law exists in necessary tension with legislatures and political executives: in the Westphalian state, power is limited by law and is ideally exercised within the rule of law. Arbitrariness invites a conception of justice where might equals right. Thus, the Western legal tradition can be seen as an extended answer to the question posed to Socrates by Thrasymachus in *The Republic*: justice exists in the social harmony of balanced institutions, not in the power of the stronger. Moreover, Christenson wants his typology to be flexible enough to allow for change, especially since he asserts that “political trials ... assist in the organic growth of the law” (1989, 9). Because such trials encapsulate momentous stories, they demonstrate “the tension between reality and ideals, between the stable and the dynamic, between the immanent and the transcendent, [and in so doing] produce change” (ibid.). However, his theoretical intention does not agree with the practical solution he proposes, as any typology with a limited number of boxes, as well as examples that cover two millennia of history, is likely to be subject to inevitable conceptual stretching – a “forced fitting” of trials into inappropriate boxes. The result falls short of original aspiration, and the numerous examples provided by Christenson in each box of the typology illustrate the point. The Spanish Inquisition is classed as a trial of power and expediency “designed to further the domination over an ethnic group” (ibid., 12). However, one can hardly categorize “heretics” as an ethnic group, in a category of trials involving “nationalists” – centuries before nationalism can be said to have existed on the European continent.

political trials within the rule of law presume that all are equal before the law” (ibid., 10). Thus trials under the rule of law “are fair trials despite their political agenda” (ibid.). However, many case studies provided by Christenson contradict this claim, and so does an examination of other trials commonly viewed as “political.” Many political trials have supposedly been conducted within the rule of law, yet they have resulted in so many miscarriages of justice and errors of trial process as to bring procedural fairness into serious question. It is too simplistic to suggest that fair trials are those which occur in a regime operating under the rule of law. There are gradations of trial fairness within the rule of law, and not all partisan trials are equally “despotic.” For example, in Christenson’s typology, Stalin’s show trials and the Sacco and Vanzetti trial were all partisan trials.²⁶ This, even though the Moscow trials of the 1930s were scripted and rehearsed in advance according to the dictates of the party-state and the personal antipathies of Stalin. In other words, they were outside the rule of law in ways that the Sacco and Vanzetti trial clearly was not.

Unfortunately, Christenson assumes that the concepts of “rule of law” and “partisanship” have been ahistorically static and that sweeping comparisons can be made across dramatically different eras and experiences. At what point can the “rule of law” be said to have been firmly consolidated and established in the Western legal tradition? Certainly at some point *after* the trial of Guy Fawkes in 1606 and that of Francis Bacon in 1621; both are listed as “political trials within the rule of law” in Christenson’s typology. Likewise, the trials of Anne Boleyn and Marcus Garvey are unproblematically lumped together as trials of revenge. The differences in these cases belie the similarities that are forced by the typological

²⁶ Christenson considers Stalin’s purges as trials of “dissent” – which is arguably an incorrect categorization, as Stalin was principally using the trials as a means of eliminating his fellow comrades at the highest levels of Soviet leadership (e.g., the trials of Kamenev, Zinoviev, and Bukharin). More properly, they could generously be considered trials of regime consolidation, or negatively as an expression of personal paranoia. The Sacco and Vanzetti trial is categorized as a trial of nationalists, and the animating question is whether or not the trial is designed “to further the domination over an ethnic group” (Christenson 1989, 12). In the aftermath of the Palmer Raids in the United States, the trial was less about furthering American domination over Italians, and about responding to the perceived threat of radicalism – in this case anarchism. Moreover, the involvement of Sacco and Vanzetti in the South Braintree murders is still debated, and questions of factual innocence aside, they were nonetheless wrongfully convicted.

division. Christenson wants to allow for the existence of similar political issues as motivating both trials within the rule of law (while denying the relevance and messiness of motive in any particular case), yet he admits that the questions shift, making the parallel structure of the typology difficult to sustain analytically.

Finally, though Christensen promotes the important storytelling purpose of political trials, his typology does not allow for each story to be situated in its own historical and political context. Rather, his analytical gaze is trained on the “innards” of the trial, and as a consequence, very different trials fall into the same given category in curious ways. Moreover, he makes no normative assessments of trials, aside from his claim that partisan trials just “are” political trials by virtue of fitting into one of the boxes in his typology. Christenson himself admits that it is inherently difficult to create a typology with distinctive and separate boxes corresponding to particular types of trials: “Any attempt to arrive at a typology involves a Procrustean effort to fit unique cases into a few pigeonholes. More than one political question can be raised in a given trial. Dissenters are often nationalists, and nationalists dissent. From John Lilburne and Peter Zenger to Lech Walesa, challengers of entrenched power raise many questions. How, for instance, should we categorize those in the Soviet Union? Some dissent on religious grounds, others for classically liberal reasons, and still others as nationalists” (ibid., 11).

Any typology with fixed boxes would likely be unable to cover all cases of trials that might at first blush be considered political. Such typologies function as Weberian ideal-types; though heuristically useful, they do not necessarily simplify the process of identifying political versus non-political trials, except that they enable us to say that something looks more like “x” than “y.” The many boxes create the illusion of analytical ease; but closer scrutiny demonstrates the difficulty in distinguishing between types of trials, or in categorically stating that one trial was political whereas another was not. Greater historical and contextual examination is *always* required, as well as criteria that do not focus on a single variable. Just as each verdict must be based on the evidence put forward and the facts of the particular case, so there is no avoiding looking at the “larger” facts of context and history in determining the political or apolitical nature of a specific trial. A more flexible approach would

consider a range of criteria, none of which is singularly determinative, instead of force-fitting trials into distinct and separate boxes.

Nonetheless, Christenson does make an important contribution: he reminds us that trials within *and* outside the rule of law can properly be referred to as political, and he highlights the power of trials *as narratives* that shape collective attitudes about justice, politics, and the appropriate role of legitimate government and the law. Because trials are narratives, and because they shape political identities in fundamental ways, they can properly be called pedagogically didactic.

POLITICAL TRIALS AND DIDACTIC LEGALITY

Political trials as a form of “didactic legality” are discussed extensively by Lawrence Douglas (2001) in his survey of Holocaust trials, *The Memory of Judgment*. Douglas does more than any recent analyst to highlight the positive contributions of political trials. He considers “didactic legality” as a central pedagogical component of trials, one that promotes and protects historical truth even while addressing burdensome demands that justice be done. Arguing against Hannah Arendt’s dismissal of the Eichmann trial as essentially a show trial, Douglas explores the legal and political tensions that resulted in the “didactic” successes of the Nuremberg and Eichmann trials – successes that generated new concepts of criminality, such as genocide and crimes against humanity.

These trials came under fire while they were being held; even today, some view them as victors’ justice and/or as abuses of both law and history. Douglas argues that those criticisms are narrow and restrictive at their core.²⁷ He argues persuasively against Arendt’s insistence that “the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes ... can only detract from the law’s main business to weigh the charges brought against the accused, to render judgment, and to mete out due punishment” (Arendt 1963, 204–5).

²⁷ It is interesting that Christenson categorizes the IMT at Nuremberg not as an example of “victor’s justice” (a term he reserves for partisan trials), but as responding to broader questions of legitimacy, in this case of the former Nazi regime and the court itself. Married with Douglas’s view, the question of legitimacy is answered in the affirmative when and if the trial is a didactic “success” rather than a “failure.”

We can extend Douglas's argument by suggesting that a trial, in responding to a rupture in legality as dramatic as the Holocaust, requires a pedagogical metanarrative in order that it can represent, situate, and understand the past. Only then is legal judgment possible. Moreover, the imposition of a pedagogical metanarrative is typically not accidental; rather, it is a matter of deliberation, a political choice. In this sense, such trials are usually one element in a broader political strategy. In the Eichmann trial, denazification was the societal goal. Not surprisingly, the use of international or mixed trials in the 1990s has become part of a political continuum, one instrument in a transitional justice "tool kit."²⁸

Douglas argues that to succeed as *trials* in a democratic context, didactic spectacles "must be justly conducted insofar as one of the principle pedagogic aims of such a proceeding must be to make visible and public the sober authority of the rule of law" (2001, 3). However, can one imagine a didactic "success" that is a legal failure? Or a legal success that is a didactic failure, where the law cannot sufficiently deal with this larger task? Here the trier of fact formalistically narrows its own universe of discourse to the more traditionally "legal" core competencies of determining the culpability of the accused in committing all the elements of the offence, beyond a reasonable doubt, and on the basis of the evidence provided. Extending Douglas's argument beyond trials involving traumatic history, *any* trial where didacticism is strongly evident may have a political objective and further a desire on the part of the

²⁸ The transitional justice "paradigm" has held that five requirements must be met to achieve sustainable peace and a "successful" transition: (1) criminal prosecutions of perpetrators (following Kirchheimer, to eliminate political foes of the new regime), in domestic, hybrid, or mixed (with international and domestic judges, as in Sierra Leone) courts or through international prosecutions, either via ad hoc tribunals such as the ICTY and ICTR or through the new ICC; (2) some process of "truth telling," for example, through a truth and reconciliation commission, as in Chile or South Africa; (3) consideration of reparations (in turn highly dependent on economic capacity and redevelopment); (4) institutional reform (not simply democratization and constitutionalization, but also establishing the rule of law, building state capacity, and eliminating corruption and allegiance to the former regime); and (5) processes of societal reconciliation. Examples of institutional reform include: the *Persilschein* (literally, a "laundry certificate") and other efforts of the Denazification Policy Board to eliminate all active supporters of Nazism from important public or private positions in postwar West Germany; passage of lustration laws in many post-Communist Central and East European states; most recently (and unsuccessfully), the process of de-Baathification in Iraq. See in particular the work of the International Center for Transitional Justice (ICTJ) (<http://www.ictj.org>).

prosecution, as directed by the state, to instruct as well as to judge. Didacticism – whether as a contributing factor to legal success or as a bellweather of legal failure – is likely a key criterion of political trials. However, this didactic element is not something reducible to the correlative relationship between offence and punishment, which itself has an implicit pedagogical component. The traditional legal “lesson” to be learned inheres in the level of punishment meted out by the state or the judicial system in the sober exercise of this function, consonant with the nature and severity of the crime and the resulting stigma attached to the proven offender.

However, didactic legality moves beyond this modality of discipline and punishment, imposing on the trial a broader imperative that is fundamentally extralegal. In the “successful” examples provided by Douglas, the law and the trial were used as vehicles to clarify or elucidate the historical record, either through documentary evidence (Nuremberg) or through the privileging of the testimonial narratives of survivors (Eichmann). In neither case were these objectives allowed to overwhelm legal norms or procedural safeguards; instead they successfully situated the trials in the public mind as a kind of sociological microcosm representing and concentrating the demands of a particular historical and political moment. Indeed, one reason for the “success” of didactic legality in each case was that, paradoxically, in order for the pedagogy to prevail, it had to be self-limiting, constantly challenged, and subject to renegotiation. That is, there had to be a certain level of “push back” on the court’s part.

Thus Nuremberg was constituted as the international tribunal of the victorious powers, which, in the words of Justice Jackson, decided on the legal process to “stay the hand of vengeance” in the face of such monstrosity. His legendary opening statement underlined a pedagogical purpose: “The wrongs which we seek to condemn and punish have been calculated, so malignant, and so devastating, that civilization cannot afford their being ignored, because it cannot survive their being repeated ... Civilization can afford no compromise with the social forces, which gain renewed strength if we deal ambiguously or indecisively” (IMT II, 130).

Nuremberg represented a political and legal synergy, in that it created the new offence of “crimes against humanity” and chose to

prosecute on the basis of individual guilt that was suggestive of broader collective responsibility. So disturbingly innovative was this new approach that Douglas repeats Shklar's criticism – that “there was not even a pseudo-legal basis” for it (in Douglas 2001, 44). Douglas responds by suggesting that the articulation of this new legal idiom was necessary, but not for prosecutorial purposes; rather, it had more traction as an element of didactic legality.²⁹

In the case of Eichmann, Douglas describes how chief prosecutor and Israeli Attorney General Gideon Hausner framed the trial by relying heavily on survivor testimony. Witnesses were not portrayed as victims whose random survival was as unfathomable as the death of so many millions; instead, their survival was endowed with heroic meaning. Their testimony was affirmed not through the opportunity to relate their experiences to the guilt of the accused; witnesses received national affirmation in the act of telling *their own stories*. The trial was clearly political, given the charges, the nation-building motive behind locating the prosecution in Israel, and the concern for didactic spectacle. Hausner also tapped into the deeper narrative and social functions of trials by focusing on the witness's stories. Unlike the IMT, where the defendants were found guilty (or not) on the basis of largely Nazi documentation, Eichmann's guilt was reinforced through narrative.³⁰

Many political trials begin with the avowed purpose of imparting political “lessons” and “educating” the broader public about atrocities, threats, or enemies. Douglas, for good reasons, describes the IMT and the Eichmann trial as “success stories” of didactic legality; but there have been many other cases where, in efforts to impart important political lessons, to instill support for a new regime, or create a public record of crimes of the past for posterity,

²⁹ In his analysis of the history of how the charges evolved into the actual wording selected for the IMT charter and how they played out in the trial strategy of the Allies, Douglas painstakingly demonstrates that the new crimes-against-humanity offences in practice were made accessory to crimes against peace. Thus the trial contained the extraterritorial and supratate potential of the charge by fixing on categories more familiar: war crimes and waging aggressive war (see esp. Douglas 2001, 53-56, 65-66).

³⁰ This was also a chief criticism levied by the trial's most famous chronicler, Hannah Arendt. Though her account *Eichmann in Jerusalem* is best known for its portrayal of Eichmann as personifying the “banality of evil,” a close reading illustrates her ongoing concern (and contempt) for the fixation on witness testimony that did not directly relate to the question of the guilt or innocence of the accused.

the results have been mixed or even questionable. Regarding the Auschwitz Trial of 1963, Attorney General Fritz Bauer, who was largely responsible for bringing to trial the twenty Auschwitz perpetrators, believed that the resulting verdicts were unsatisfactory: most were found guilty of aiding and abetting, not murder; as a consequence, Germans were able to continue believing that the worst of their complicity lay in assisting the few who were truly responsible. However, as Rebecca Wittmann has cogently argued, the outcome of that trial was contradictory. It did bring the atrocities to the front pages of the newspapers, and it did foster a public debate in West Germany that would grow in force and depth into the late 1960s and 1970s. It also brought to light important historical sources and highlighted the centrality of Auschwitz in the Final Solution. As well, the court rejected the superior-orders defence – highly significant, considering the historical value placed on obedience in German political and military culture. Yet Arendt later declared bitterly that the entire ordeal – the trial lasted more than 180 days – had no lasting impact on public opinion (in Wittmann 2005, 246). Moreover, there was considerable criticism regarding some of the light sentences handed down. Even so, if one accepts the necessity of “push back,” all of these criticisms can be interpreted as indicating a successful trial, that is, one that did not seek to become a show trial or attempt to place Auschwitz itself in the dock. Perhaps postwar Germany is a special case. In any event, historians will continue to debate whether such trials didactically succeed either in encouraging *Vergangenheitsbewältigung* (an overcoming of the past) or in situating National Socialism within a frame of contrition and responsibility.³¹

Nonetheless, one is pressed to be even more sanguine in assessing the possibilities of didactic success in recent political trials – specifically, those which have attempted to confront the recent past and educate sympathizers and victims alike. In the trial of Slobodan Milošević, the defendant’s tirades, the trial’s length, and four years of procedural inefficiencies worked against the drawing of any “lessons.” And the failure was even greater because the chief protagonist died during the proceedings. Yet that trial did establish

³¹ On this point, see also Buruma (1994), Osiel (1997), Judt (2005, esp. 41-62), and most recently Art (2006).

some critical precedents: a former head of state was brought before an international court representing the collective will of the UN Security Council; the nature of command responsibility was carefully probed; and the right of self-defence was entrenched, even when the accused tried the patience of the court through constant grandstanding and filibustering and by deploying his own ill health as a strategy. Also, in an effort to convict the former Yugoslavian president, tens of thousands of pages of oral and written evidence were collected, all of which will be scrupulously mined by future historians and may help convict indictees still at large, such as Ratko Mladić and Radovan Karadžić, should they finally be brought to The Hague.³²

However, these hopeful conclusions cannot be applied – even remotely – to the trial and execution of Saddam Hussein. Well before the sentence and execution, the Iraqi Special Tribunal was plagued by resignations, defections, and violent death. The trial’s naysayers continue to charge that the court was stacked with handpicked loyalists. Moreover, the security made necessary by Iraq’s current instability resulted in a garrison mentality, which was hardly conducive to an open and public court. One can argue that the trial should have been stayed until the end of the current insurgency or civil war; that it should have conformed to international norms by eliminating the death penalty as a potential sentence; and that Hussein should have been charged initially with genocide or crimes against humanity, not with the more “limited” massacre of 148 Iraqi citizens in Dujail after an assassination plot against the former leader was uncovered.³³

POLITICAL TRIALS, WRONGFUL CONVICTIONS, AND LEGAL RISKS IN THE COLD WAR AND THE GLOBAL WAR ON TERROR

In recent decades, scholars of criminal law have been analyzing various factors that collectively contribute to high-profile wrongful convictions, as part of a broader spectrum of miscarriages of justice.

³² See *The Trial of Slobodan Milošević* (IT-02-54 <http://www.un.org/icty/milosevic>). See also Lesser (2004, 37-52), Simons (2006), and Dicker (2006). For a discussion of the background to the sixty-six charges and the key legal issues in the trial, see Scharf and Schabas (2002).

³³ The former president of Iraq was formally charged with crimes against humanity before the defence opened its case on May 15, 2006. For contrasting views, see Berman (2005) and Scharf (2004).

While not specifically analyzing trials that produced wrongful convictions as *political* trials, they have nonetheless illuminated a number of key variables that are often simultaneously in operation during political trials, or that serve to further politicize trials. Wrongful convictions represent a dual failure of justice: not only is an innocent person wrongly accused and convicted, but a guilty person is thereby allowed to go free (Martin 2001, 77). And if a wrongful conviction occurs because of one or more politically motivated miscarriages of justice, then a triple failure can be said to have occurred, for due process and impartiality have been politically compromised.

Miscarriages of justice are often not overtly political. As Martin argues, a host of factors converge to produce tunnel vision among law enforcement authorities. In a broader institutional environment, the situation may become highly politicized so that the accused is portrayed as politically or ideologically odious; when this happens, careful scrutiny of evidence is overshadowed by the operations of stereotypes and institutional biases. As Martin concludes, most wrongful convictions demonstrate at least one of the following three “predisposing” circumstances: “(1) the case places significant pressure on authorities to resolve with a conviction, (2) the accused was a marginalized outsider, and (3) the case rested on suspect or inherently unreliable evidence” (*ibid.*, 83).

Martin’s “paradigmatic case of wrongful conviction” involves a heinous unsolved crime, an unpopular accused, an inadequate defence, zealous prosecution, and little “real” evidence. Shklar’s legalist ideology, intense media exposure, and surrounding political discourse can further combine with these “classic” factors to produce political trials in at least three of the four senses outlined by Becker. Moreover, Martin’s “unpopular accused” corresponds with Kirchheimer’s “political adversaries” – both aim at their legal elimination – and as such, political trials can be read as potential wrongful convictions. Though accused who are prosecuted for political crimes (such as espionage or terrorism-related offences) might be portrayed as dangerous and powerful representatives of systemic threats (e.g., global terrorist networks or communist insurgencies), individuals accused of such crimes are often socially, racially, ethnically, or politically highly marginalized – indeed, quite

powerless. Moreover, these factors are mutually self-reinforcing: when threats are exaggerated or the crime overdramatized, there is greater pressure to convict and the likelihood increases that the case has been constructed too hastily, or that it is based too heavily on circumstantial evidence. At a minimum, evidence may be overemphasized that has proven susceptible to human error and misjudgment. Examples of such evidence include faulty eyewitness identification, inaccurate or perjured testimony, false confessions (which may be legitimately false, politically motivated, or extracted under mental or physical distress), circumstantial evidence (when too much reliance is placed on it), information extracted from or “volunteered” by jailhouse snitches, and evidence supported by questionable science.³⁴

Suspect or false confessions are a hallmark of political trials. Even in non-political trials, an accused who is submissive and repentant and who enters a guilty plea is morally preferred and is generally subject to better treatment by judges and juries. Confessions affirm ritualistic and public ownership of wrongdoing; they also reinforce claims by authorities that the “right” perpetrators have been caught, will pay their debt to society, and are indeed better candidates for rehabilitation. An accused’s refusal to admit guilt, show remorse, or display ambivalence is socially and psychologically disruptive; it also stokes lingering doubts even where the standard of reasonable doubt ostensibly provides insurance against wrongful conviction. Worse still, when the accused refers to higher authorities, or resorts to either means/ends rationality or conspiracy theory to explain her or his actions, the possibility for politicization increases.

Logically, confessions have an even higher value in political trials, which emphasize their legitimation, education, and deterrence functions – functions that in turn increase the didactic value of trials. Confessions can provide “proof” of disloyalty, as in the Moscow show trials of the 1930s and the postwar East European trials; confessions, after all, legitimize the charges laid by the

³⁴ For a basic overview of the major issues in the literature of miscarriages of justice, see Walker and Starmer (1999, esp. 31-55) and Westervelt and Humphrey (2001). On the frailties of eyewitness identification, see Wells and Loftus (1984) and Natarajan (2003). On false confessions, see Trotter (2005) and Sherrin (2005).

prosecuting regime. In an atmosphere of public paranoia and fear, confessions demonstrate the value of public loyalty and the legitimacy of guilt by association. That was certainly the case during the proceedings of the House Un-American Activities Committee (HUAC) in the late 1940s and early 1950s, during which the reputations of scores of American citizens were blackened by their answers or non-answers to questions about their membership in the Communist Party.

Historically, examining specific trials and the criminal trial process more generally through the lens of wrongful convictions and miscarriages of justice is a relatively new exercise. Especially in the United States, many cases examined in the literature have been driven by the use of DNA evidence. However, in the United Kingdom, there has been an analytical intersection between studies of wrongful convictions and those of high-profile political trials, most notably the Irish terrorist cases of the “Birmingham Six,” “the Maguire Seven,” and the “Guildford Four.” The British experience highlights how the danger of wrongful conviction is multiplied when there is an obvious political overlay to the trial. As Kent Roach and Gary Trotter (2005, 968) have pointed out:

Wrongful convictions in all cases are corrosive to the integrity of the justice system, but they are particularly corrosive in terrorism cases. As in the so-called Irish cases in the United Kingdom, miscarriages of justice may be taken as a partial affirmation of some of the political or other grievances of the terrorists. This is particularly so if democracies that claim to abide by the rule of law and equal rights and justice for all do not live up to these ideals when they are threatened by terrorism. The temptation of departing from normal legal standards and engaging in pre-judgment, prejudice, and stereotyping may be particularly high in emotive and devastating cases involving allegations of terrorism and fears of continued acts of terrorism.

When high-profile terrorist trials are revealed to be politically compromised – both as “political” trials and as political “trials” in Becker’s sense – then the prosecuting state loses considerable moral high ground and legitimacy, while those committing illegal acts to publicize political and historical grievances are both outraged and emboldened by their newly reinforced ideals and counterstereotypes.

The Irish terrorist cases also provide evidence of Martin's "tunnel vision" in action.³⁵ During the "Troubles" of the 1970s, a time when there were numerous terrorist bombings on English soil, with hundreds of civilian casualties, there was considerable public pressure to find and punish the guilty. The accused were marginalized outsiders; thus they were subject to a knee-jerk "guilt by association" response on the basis of whom they knew and whom they had met and by the mere fact that they were Irish. Evidence was suspect; the cases are laced with instances of police misconduct, false confessions extracted by extreme interrogation techniques, the overconfident use of questionable expert evidence, biased charges to juries, unrepresentative and hostile juries, and the lack of full disclosure on the part of the British police and prosecutorial authorities (e.g., they held back alibi witnesses and other exculpatory evidence).³⁶ Public discourse was infected with the fear of more IRA bomb attacks, and many politicians encouraged this; in such a climate, improbable prosecutorial theories (such as the "bomb factory" theory that underpinned the "Maguire Seven" case) found it easier to gain currency. Arrests were "politically inspired," to use Hakman's terminology, and the trials were obviously intended to eliminate political foes (to rely on Kirchheimer's classic definition).

More specifically, though, the trials were but one part of a broader civilian and military response to the IRA, a group that rightly or wrongly was perceived as a direct threat to established political power (the hallmark of Becker's political trials). Because of police and prosecutorial misconduct, these trials were both "political" trials and political "trials." Moreover, the juries themselves were influenced by tunnel vision, and this vision was magnified via the deployment of fear as well as by the repeated use of stereotypes on the part of the media and the authorities. Eventually these cases were thoroughly investigated in a public inquiry conducted by Sir John May. His subsequent reports led to the establishment of the Criminal

³⁵ In 1975 the "Birmingham Six" were convicted of murder on the basis of the 1974 bombing of a pub that killed 21 and injured 160. The "Guildford Four" were convicted one year later for another pub bombing that killed 7 (for which the Irish Republican Army [IRA] claimed responsibility). The case of the "Maguire Seven" – who were convicted of possessing explosives – involved several related to the "Guildford Four" (including two relatives of Gerald Conlon, one of the "Guildford Four" whose story was later dramatized in the film *In the Name of the Father*).

³⁶ For a detailed account of the Irish terrorist cases in the context of current concerns regarding the potential for miscarriages of justice in the Global War on Terror, see Roach and Trotter (2005, esp. 975-98).

Cases Review Commission, the most robust institutional response that currently exists in any democratic jurisdiction charged with responding to and investigating wrongful convictions and miscarriages of justice.³⁷

The “wrongful convictions” lens is a fruitful analytical tool for examining political trials, even though this terminology and literature have not been used a great deal outside the ambit of criminal law. However, it seems appropriate to limit the term’s applicability to what Christenson calls “political trials within the rule of law,” for an implicit assumption of the literature on wrongful convictions is that such instances of systemic failure are exceptional and do not signal disintegration of the rule of law. This remains so even though many of the pillars on which trial fairness has been built have been shown to be demonstrably unsound in specific cases.

It is more fitting to look at contemporary trials (or at least trials that function in accordance with twentieth-century norms regarding due process) rather than historical trials, which are anachronistic for comparative purposes. It makes little sense to speak of the trial of Anne Boleyn or the decisions of the Spanish Inquisition as “wrongful convictions” even though they were clearly partisan trials. One could say the same of the Moscow trials of the 1930s or the postwar East European trials. Likewise, though the trials of Guy Fawkes (1606) and Francis Bacon (1621) might be considered trials within the rule of law in some early and preliminary sense – at least according to Christenson – the norms of due process that have been consolidated and entrenched in the postwar democracies of the Anglo-American world and continental Europe clearly did not apply in those cases.

On another view, the literature on wrongful convictions and the many case studies highlighted in Canada and the United States might be seen as a methodology for discussing suspect trial outcomes *without* resorting to the potentially inflammatory labelling of trials as political trials.

³⁷ Very seldom historically has there been such an institutional mea culpa response to wrongful convictions. Regarding the thirty to forty convictions per year actually referred back to the courts by the Criminal Case Review Commission, about 70 percent are overturned (Zellick 2006). The current chair of the commission, Graham Zellick, has emphasized, however, that the CCRC is not in the “business” of innocence or even miscarriages of justice – he conceives of the organizational role more narrowly as one focused on overturning unsafe convictions.

Indeed, the literature and language of wrongful convictions has become more widespread at the same time as the analytical utility of “political trials” has been on the wane. The term “wrongful conviction” implies a social scientific neutrality or legal rationality that is more case specific, more concerned with evidence or lack thereof, and less conspiratorially fixated on blame or systemic “frame-up.” However, it also remains true that many wrongful convictions are just that – the accused was minimally legally innocent and perhaps factually innocent, and politics did not intrude on the court in any way whatsoever. That said, tunnel vision can be magnified when political circumstances are extreme, so that convictions are wrongful at least in part because of the prevailing political discourse and the various ways in which politics can contaminate trial processes and/or jury deliberations.

Nevertheless, the Irish terrorist cases and more recent judicial, administrative, and quasi-judicial processes in the War on Terror illustrate this heightened potential for wrongful convictions when such trials do become political. Roach and Trotter argue that, given the past experience of the Irish terrorist cases and the research that has been done on the factors contributing to high-profile wrongful convictions in Canada, the United States, and the United Kingdom, there is a greater likelihood of wrongful convictions – or at a minimum, miscarriages of justice – in the current War on Terror. They suggest that many of the telltale factors are already firmly in place, from the predisposing factors that Martin identified (odious crimes and ethnic marginalization), through to a lack of disclosure, experts who perceive they are on the “side” of the prosecution rather than in the service of objective “truth,” and potentially prejudicial juries.³⁸ Moreover, new terrorism-

³⁸ A welcome counter-argument to Roach and Trotter’s concern regarding potentially prejudicial juries can be found in the recent case of Zacarias Moussaoui, the alleged “twentieth hijacker.” Despite considerable prosecutorial misconduct (government lawyer Carla J. Martin provided trial transcripts and improperly coached witnesses in violation of a court order and was reprimanded by Federal District Judge Leonie M. Brinkema, who in response barred the U.S. government from using testimony from aviation officials), the sentencing trial resulted in life imprisonment rather than the death penalty. Moussaoui was clearly a reprehensible and unrepentant defendant who demonstrably made clear his allegiance to Osama bin Laden and his contempt for the American victims of 9/11, and who repeatedly undermined his own case via his courtroom outbursts and non-cooperation with his appointed legal counsel. Thus, though he fits the bill as the “odious” defendant and the crime with which he was associated – 9/11 – could hardly have attracted greater public demand for redress and justice, the jurors delivered a surprise verdict, and many agreed with the mitigating factors argued by the defence. Martin’s “tunnel vision” seems to have been nipped in the bud by a strong and impartial bench as well as by careful deliberation on the part of the jury. See in particular Liptak (2006), Lewis (2006), and Linder (2006).

related offences in antiterrorism statutes passed by most of the Americans' allies in the War on Terror have generally expanded traditional forms of accomplice and conspiracy liability in the criminal law. Moreover, new forms of detention under immigration and military law are both perpetuating and reinforcing stereotypes and have resulted in a de facto reversal of the principle of the presumption of innocence (Roach and Trotter 2005, 994–95, 1000–1).³⁹ In the United States, the indefinite imprisonment of non-citizens on security grounds, and the detention of witnesses on “material witness warrants” – all without charge or trial – is eroding democratic observance of the rule of law, the right to make full answer and defence, and the principle of habeas corpus. In this respect, the liberties of a few have been marginalized in the supposed security interests of the many.

The Cold War is instructive here, for it, too, promoted the politicization of justice and the eventual use of political trials. First, there was a strong tendency on both sides of the East-West divide to establish guilt on the basis of what had not yet happened but was likely to occur. Thus in *Dennis et al.*, the CPUSA leaders were guilty because, as communists, they were by definition seeking to overthrow the legitimate government of the United States.⁴⁰ In Australia, instead of arresting the leaders of the Australian Communist Party, the government attempted to ban the party outright through the *Communist Party Dissolution Act*.⁴¹ Similarly in the War on Terror, non-citizens held in detention in Canada on security certificates or offshore by the United States as “enemy combatants” are presumed dangerous on the basis of what they *could* and indeed probably *would* do if

³⁹ A recent comprehensive and comparative survey is Ramraj, Hor, and Roach (2005).

⁴⁰ The eleven defendants, including party leader Eugene Dennis, were not charged with any overt acts. Rather, the government rested its case on the accusation that they conspired to overthrow and destroy the government of the United States by force and violence at some future time – a necessary outcome of their attachment to and advocacy of Marxism-Leninism.

⁴¹ The law was struck down by the High Court in the landmark decision *Australian Communist Party v. Commonwealth* (1951), thus truncating efforts to establish a McCarthyist response in Australia. Had the law not been challenged, criminal liability could have been established on the basis of beliefs, not actions. For a comparison of the legislative and policy responses in Australia during the Cold War with the War on Terror, see Williams (2005, 534–54).

released.⁴² Under the new “advocacy or counselling of terrorism” provisions in the most recent antiterrorist statutes passed by the United Kingdom and Australia, charges could be laid on the basis of perceived dangerous communication, not preparation or action.⁴³ Moreover, preventive detention, arrest, and conspiracy go hand in hand with guilt by association and are further fuelled by ethnic profiling.

Second, the use of secret and/or administrative processes (as a substitute for or in addition to the criminal law process) and the collection or use of secret or illegally obtained evidence are characteristic of the War on Terror, just as they were of the Cold War. David Cole has examined the American use of such processes during the Cold War. Cold War measures included Truman’s 1947 loyalty review program,⁴⁴ the attorney general’s secret process to designate subversive groups, the COINTELPRO program operated by the FBI,⁴⁵ and the deployment of semiofficial blacklists. Present-

⁴² In Canada, permanent residents who are non-citizens may be detained under a security certificate as per the *Immigration and Refugee Protection Act*, and foreign nationals who are deemed inadmissible to Canada must be detained and may be deported under such certificates. Such certificates are obtained with the signature of two cabinet ministers and the agreement of a judge of the Federal Court of Canada, who determines that the certificate is “reasonable,” usually on the basis of evidence provided *ex parte*. The constitutionality of these certificates is currently under review by the Supreme Court of Canada. See Makin (2006). Regarding the debate on enemy combatants, see Roberts (2004), Sassoli (2004), Berkowitz (2005), and Falk (2007).

⁴³ See the United Kingdom’s *Prevention of Terrorism Act 2005*, introduced in the House of Commons in October 2005, just three months after the public transportation bombings of July 7, 2005, which criminalizes speech that glorifies the commission or preparation of terrorist offences, and Australia’s *Anti-Terrorism Act 2005*, which criminalizes both the praise and the advocacy of terrorist acts as well as direct or indirect counselling.

⁴⁴ The federal loyalty program was initiated by an executive order issued by President Harry Truman in 1947. Truman was acting largely to preempt the muckraking activities of HUAC; the central Loyalty Review Board was recommended by the Temporary Commission on Employee Loyalty. Its implementation, however, was institutionally dominated by the FBI, which acquired an investigative monopoly over federal employees.

⁴⁵ COINTELPRO, or the Counter-Intelligence Program, was a secret initiative launched in 1956 by J. Edgar Hoover’s FBI to surveil, infiltrate, and “disrupt” perceived subversive organizations and individuals, including the CPUSA, Dr. Martin Luther King, Jr., the National Association for the Advancement of Colored People (NAACP), the Black Panthers, the Ku Klux Klan, and Students for a Democratic Society (SDS) during the Vietnam War. COINTELPRO’s activities included illegal wiretaps, warrantless searches, break-ins, and the use of agents provocateur and networks of informers. Moreover, it worked with the Internal Revenue Service (IRS) to prompt audits of targeted individuals and organizations, and it pressured universities and colleges to dismiss radical faculty. Over its life, COINTELPRO conducted 1,330 anticommunist actions alone; when Hoover eventually informed his political superiors (first Eisenhower, then Kennedy) of the program’s existence, he concealed the extent of its activities and their illegal nature. See both Cole (2005, 154-58) and Schrecker (1998, 226-28).

day measures have similar features. Examples include the National Security Agency's illegal wiretapping activities;⁴⁶ the use of preventive detention; the more expansive and pretextual use of immigration law, with its many technical violations; post-9/11 secret investigations and special interest deportation hearings; broad use of discretion; and relaxed procedural standards as an effective and immediate surrogate for criminal law.⁴⁷ In Canada, the case of Maher Arar symbolizes the potential for wrongdoing when secret evidence based on intelligence information obtained from foreign sources is accepted at face value.⁴⁸

It has repeatedly been argued that secrecy is both justifiable and structurally necessary, even though it works against open, fully deliberative, and adversarial legal processes and trials. In the United States during the Cold War, secret evidence (often derived from informers or confessions) was used in immigration and administrative processes in order to cast a wide net of guilt by association, as well as to indict suspects in criminal and espionage cases. Such evidence was often not made public or even mentioned at trial.⁴⁹ For national security reasons, the government never made public the decrypted Soviet cables that both "proved" the guilt of Julius Rosenberg and largely exonerated his wife, Ethel. In the East

⁴⁶ See Risen and Lichtblau (2005, 2006).

⁴⁷ See Cole (2005, esp. chaps. 2 and 3). For a prescient Canadian perspective, see Macklin (2001, 383-404). Kent Roach has argued that in comparison with the "sometimes lawless and no-holds-barred" approach to the War on Terror, use of the criminal sanction is preferred, given the entrenchment of principles such as individuality, legality, and due process. See in particular Roach (2003, 129-51).

⁴⁸ See, for example, Shane (2005).

⁴⁹ The Venona decryption project (a top secret project of the National Security Agency) identified David Greenglass, Ruth Greenglass, and Julius Rosenberg as suspected atomic spies; for a detailed discussion see especially Haynes and Klehr (1999) and Weinstein and Vassiliev (1999). The Venona materials, as well as other recent evidence linking Julius Rosenberg to espionage, are also discussed in the introduction to the second edition of Radosh and Milton, *The Rosenberg File* (1997, ix-xxx); the former KGB resident Alexander Feklisov's memoir (Feklisov and Kostin 1999); and Sam Roberts's (2001) account of the trial through the experiences and reminiscences of Ethel Rosenberg's brother David Greenglass. These last three works suggest both the guilt and the "value" of Julius Rosenberg; however, debate continues as to the "innocence" or at minimum non-active involvement of Ethel Rosenberg. The evidence regarding Ethel, slim even according to the FBI, is subject to debate; see in particular the account of the Rosenbergs' son Robert Meeropol (2003). Without doubt, Ethel was used as a pawn by J. Edgar Hoover in an unbelievably high-stakes effort to get Julius to confess, and most conclude that she was hardly the scheming mastermind painted by defence prosecutor Roy Cohn. For a brief yet definitive discussion, see Dershowitz (2004, 319-28).

European trials, much of the evidence on which the charges were based, if not reinforced by false confessions, *had* to be kept secret because it was largely fabricated. During the present-day War on Terror, many individuals have been charged with minor immigration violations, then detained as threats to national security; given the classified nature of the evidence, they have not been able to adequately challenge their detention.⁵⁰ Evidence should only be classified where disclosure would directly harm national security; it should not be classified simply to make more interdictions and arrests or to make convictions easier to obtain. Overreliance on secrecy threatens democratic constitutional safeguards (e.g., the right to make full answer and defence), which increases the possibility of wrongful convictions and/or deportations.⁵¹ Secret evidence cannot be tested through cross-examination or through rules prohibiting hearsay or requiring corroboration; nor can it be judicially analyzed for materiality or relevance; nor is it subject to the careful balancing of probative value versus prejudicial effect.

Finally, secrecy and guilt by association combine to politicize justice and compromise verdicts. Though the legal cornerstones of prosecution during the Cold War, such as the 1952 *McCarran-Walter Act*, were later found to violate First Amendment provisions of the U.S. Constitution because they imposed guilt by association on defendants, the law was repeatedly and successfully deployed to prosecute and persecute alleged communists, on many occasions at the appellate and Supreme Court levels. The 1940 *Alien Registration Act* (the Smith Act) required all aliens to be registered and finger-

⁵⁰ David Cole discusses the cases of Hany Kiereldeen, Nasser Ahmed, and Dr. Ali Yasin Mohammed Karim, all of whom spent between nineteen and forty-two months in detention on the basis of secret evidence before being released. In all three cases, legal challenges were mounted to force the INS to declassify or at minimum summarize the evidence justifying the detentions. Only after partial disclosure were they able to mount an adequate defence and clear their names. See Cole (2005, 170-79).

⁵¹ In the United States, the Sixth Amendment Confrontation Clause guarantees the right of the accused to confront all evidence used against him or her, and the Fifth Amendment Due Process Clause requires prosecutorial authorities to disclose any exculpatory evidence. Likewise, in Canada, Sections 7 and 11(d) of the *Charter of Rights and Freedoms* have been interpreted as constitutionalizing the right to make full answer and defence, and the leading case of *R. v. Stinchcombe* (1991) requires that “all relevant information must be disclosed subject to the reviewable discretion of the Crown” – that is, not only what is introduced into evidence. However, though this obligation is not absolute – Crown must respect informer privilege – no distinction is made between inculpatory and exculpatory evidence (both must be disclosed to accused).

printed; later, this act made possible the prosecution of the CPUSA leadership because its provisions criminalized the advocacy of the violent overthrow of the U.S. government. The *Taft-Hartley Act* mirrored the language of the Smith Act by requiring union officials to declare their loyalty and swear that they were not members of any organization committed to the violent overthrow of the government. Both CPUSA members and members of legitimate trade unions were treated as presumptively guilty.⁵²

Cole notes that guilt by association lives on in the War on Terror, through the extensive use of ethnic profiling and a special post-9/11 registration program in the United States aimed at Arab and Muslim citizens; obviously, this diminishes the principle of individual guilt. Guilt by association and xenophobia (i.e., fear of aliens as potential sources of sedition and disloyalty) has a long history in the United States. Indeed, the drawing of legislative and policy distinctions between citizens and non-citizens, along with a deliberate deployment and cultivation of fear of non-citizens, the labelling of political adversaries as typically and likely outsiders, and the identification of both using various forms of guilt by association, has been a time-honoured exercise in both nation building and political consolidation in the United States, especially at times of national crisis, international instability, or war. Tellingly, the original nativist legislation of the United States was titled the *Alien and Sedition Acts* of 1798, and presidents from McKinley to Wilson, from Roosevelt to Nixon, have found it politically expedient to link aliens and “hyphenated Americans” (with their assumed divided loyalties) with sedition, disloyalty, and all forms of political dissent. By comparison, in the Soviet Union, from Stalin’s tirades against Trotsky through to the labelling of East European communists as Zionist conspirators, Jews were constantly suspect as counterrevolutionaries within the Soviet Bloc as well as capitalists intent on ruling the world. In both cases, the responses of political elites tapped into and encouraged local prejudice.

⁵² Legal reversals were slow in coming. Over one hundred communists were indicted under the Smith Act, but eventually the *Supreme Court* in *Yates v. United States* ruled that advocacy of illegal action was required for successful prosecution, not simply membership in an organization with a vague commitment to revolution. Furthermore, in *Scales v. United States* the Court held that federal prosecutors had to demonstrate not simply membership in the CPUSA but also that the specific defendant specifically intended to further illegal aims of the party. See *Yates v. United States* 354 US 298, 324-325 (1957) and *Scales v. United States* 367 US 203, 224 (1961).

The eminent legal scholar Ronald Dworkin has written presciently on the dangers of politicizing the justice system in the War on Terror and has reminded the American public and lawmakers alike that civil and human rights and commitments to due process remain at risk, given the pervasive climate of fear and some of the questionable legal tactics of the Bush administration, such as the detention of “enemy combatants” at Guantánamo Bay without review or status determination under Geneva law, the more recent conduct of the Combatant Status Review Tribunals,⁵³ the decision to move the José Padilla case to civilian court,⁵⁴ and the debatable use of such precedents as *Ex Parte Quirin* to support the use of special military tribunals.⁵⁵ Dworkin stated as early as 2002:

We should not be surprised at any of this. September 11 was horrifying: it proved that our enemies are vicious, powerful, and imaginative, and that they have well-trained and suicidal fanatics at their disposal. People’s respect for human and civil rights is very often fragile when they are frightened, and Americans are very frightened. The country has done even worse by those rights in the past, moreover. It suspended the most basic civil rights in the Civil War, punished people for criticizing

⁵³ Edited transcripts of cases already heard by the Combatant Status Review Tribunals have now been released on the website of the U.S. Defense Department, in response to a lawsuit brought under freedom of information legislation by Associated Press (<http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html>). See also Golden (2006).

⁵⁴ See also Liptak (2006) and Stout (2006). José Padilla is an American citizen captured within the United States who was originally labelled an “enemy combatant” and was rumoured to be involved in a radiological “dirty bomb” plot. After capture, he was detained for more than three years in a Navy brig. Padilla’s case was then suddenly transferred to civilian court after his legal counsel filed an appeal to the Supreme Court asking for a ruling on the question of the presidential power to indefinitely detain American citizens in the United States without a criminal charge or trial. Given the transfer to civilian court, the Supreme Court subsequently declined to entertain the appeal. The grand jury indictment in the civilian trial contained no mention of the “dirty bomb” plot accusation; rather, the government alleged that Padilla had conspired in the 1990s to provide support to overseas jihadists in Bosnia and Chechnya. On August 17, 2007, after a five-month trial, Padilla was found guilty. See Martinez (2007), Liptak (2007), and Goodnough and Shane (2007).

⁵⁵ Regarding enemy combatant status, Dworkin refers extensively to the Second World War case of *Ex Parte Quirin* (317 US 1, 45 [1942]), where the U.S. Supreme Court decided it was legal for eight German saboteurs to be tried by a secret military commission (sometimes referred to as a military tribunal). In *Hamdan v. Rumsfeld*, the U.S. Court of Appeals held that *Ex Parte Quirin* and congressional approval for the War on Terror (though absent an outright declaration of war) effectively authorizes military commissions. Dworkin criticizes the Court’s deferential reliance on *Quirin*, which has been widely criticized as wrongly decided, as is the Court’s decision in 1944 to allow the internment of Japanese-American citizens. See Dworkin (2002, 44-49; 2003, 37-41; 2004, 26-29).

the military draft in World War II, and after that war encouraged a Red Scare that destroyed the lives of many of its citizens because their political opinions were unpopular. Much of this was unconstitutional, but the Supreme Court tolerated almost all of it.

We are ashamed now of what we did then: we count the Court's past tolerance of anti-sedition laws, internments, and McCarthyism as among the worst stains on its record. That shame comes easier now, of course, because we no longer fear the Kaiser, kamikazes, or Stalin. It may be a long time before we stop fearing international or domestic terrorism, however, and we must therefore be particularly creative now. What we lose now, in our commitment to civil rights and fair play, may be much harder later to regain. (Dworkin 2002, 44)

Dworkin has effectively challenged the premises of the liberty versus security debate that underpin many of these extraordinary practices. Average non-Muslim citizens – not only of the United States, but also of current American allies in Afghanistan or Iraq – hardly run the risk of indefinite detention or extraordinary rendition; thus the only balance in play is between the majority's security and the rights of others. In this regard, Dworkin argues the debate must shift from self-interest to moral principle. If Muslim Americans, or Muslim non-citizens on American soil, are disproportionately shouldering risks of security profiling, FBI questioning, or outright detention, then these practices must be thoroughly critiqued as evidence of guilt by association in action. To the extent this is the case, the possibility of politicized or political miscarriages of justice – whether or not actual trials take place and deportations or convictions result – is clearly enhanced.

CONCLUSION: REVISITING THE DEFINITIONAL PROBLEM AND ESTABLISHING CRITERIA

Current efforts to politicize justice in the War on Terror, and past efforts during the Cold War on both sides of the East-West divide, demonstrate the ongoing importance and policy relevance of establishing a workable set of criteria for identifying political trials. As has been shown, such trials and their related legal processes are not merely a curious feature of a less democratic past or of regimes operating with little or no commitment to the rule of law. However, efforts to arrive at a single determinative

criterion are doomed to failure. Likewise, efforts to portray all trials as political are overcomprehensive and offer little explanatory value. Furthermore, complicated schema that consider political trials at their earliest sociological beginnings are difficult to map onto present circumstances.

That said, Kirchheimer's parsimonious definition is seductive, given his focus on the elimination of political foes through systems of rules – for what is law if not a system of rules? And trials, remember, are concentrated deployments of such rules. By accepting his rubric, we can avoid the arbitrary division of trials into partisan/non-partisan or outside/within the rule of law – a division that characterizes Christenson's typology. Like Douglas, Kirchheimer maintains that judicial proceedings can yield tactical didactic advantages to the regime: simultaneously, they can be spectacle, pedagogy, and an exercise in legitimation. However, to cast a trial as a contest of political adversaries is to privilege the war over the battle. Left unexplained by that perspective is what makes a trial a political trial in different ways and in different contexts.

Becker forces the analyst of trials to move quickly beyond the trite slogan that all trials are in some sense political in that they are inherently supportive of the system. At the same time, he suggests that criminal cases are more likely to be political in the institutional, system-supporting sense because they are concentrated expressions of public law. One is reminded that the more contemporary discourse on wrongful convictions evolved from an examination of criminal trials with suspect outcomes – again, a public expression of the coercive power of the state, often against a lone and marginalized individual. Becker also brings some useful subtleties to Kirchheimer's classic approach by differentiating among types of trials: those where the crime itself is political (political trials); those where indictments are political and impartiality/independence is compromised or non-existent (political "trials"); those where charges themselves may or may not be political, but prosecutorial discretion is deployed for political ends ("political" trials); and, finally, those which are pervasively political in terms of the charges, the behaviour of the prosecution, the lack of impartiality or judicial independence, and the intended and prescribed result ("political trials"). Becker's approach allows us to see political trials in a

matrix: one axis relates to the offence and prosecutorial discretion in the indictment process, the other to the trial itself. When we marry Martin's concern about tunnel vision to Becker's definition, we can see that wrongful convictions are more likely to occur in political trials generally, given the presence of significant political pressure and of accused who are legally vulnerable as a consequence of guilt by association or ascriptive identification with a "suspect" group (e.g., a particular ethnic group or religious minority that is portrayed as threatening).

Becker views political trials in any of his four categories as various forms of legal abomination. Hakman, for his part, rotates the analytical lens to view political trials as a potential strategic choice in a broader game of litigation politics. In this view, politicizing justice can be a useful tactic in progressive and proactive public interest advocacy. Politicizing criminals and trials lays bare the ideological foundations of indictments; it can also make tunnel vision less likely by forcing prosecuting authorities to defend their decisions and outcomes in the face of such a critique.

Hakman has a somewhat crude view of the ideological overlay; Shklar's discussion of legalism as ideology is considerably more sophisticated. Trials are political because they are the ultimate expressions of legalism. At first blush, this may seem a categorically sweeping indictment; however, her discussions of specific trials remind us that context is everything – that is, not all political trials are political in the same way or for the same reasons. Yet like Hakman and Douglas, she sees didactic value in political trials as long as they do not succumb to political expediency entirely, in which case they are but purges by another name. Ends as well as means are important here, for if the broader purpose of the trial endangers societal freedom, then prosecution is not worth the risk. It remains debatable whether terrorist trials or other administrative or quasi-judicial processes cross Shklar's line in endangering freedom; there does, however, seem to be a disproportionate distribution of risks in the current War on Terror, just as there was a disproportionate distribution of risks during the Cold War. When proportionality is constantly undermined in the name of liberty, even (arguably) in the service of national security, politicization of the legal process may already have begun.

It is not possible to craft a single definition of a political trial that encompasses the necessary levels of specificity and generality so as to not render this elastic and contestable concept meaningless in application. As is clear from the literature and from historical experience, suggesting that all trials are political in the institutional sense may be technically true, but it is also analytically unhelpful. Reserving the label of political trials for either (a) trials with politically predetermined outcomes or (b) politically motivated miscarriages of justice, or even (c) wrongful convictions where tunnel vision has systemically (though not necessarily overtly or with malice) resulted in politically tainted outcomes given a broader political context, negates the possibility of political trials as a positive phenomenon, as foundationally important to the requirements of transitional or historical justice. Yet it *is* possible to view political trials on a continuum, where trials are more *or* less political (using Becker's schema, they move from "political" trials through to political "trials" and finally "political trials"). At the same time, I would also suggest that no criterion ought to be singly determinative when compiling a set of constitutive factors to be examined in considering whether trials are political trials. With these broad caveats, I contend that a list of criteria ought to include the following:

1. *An obvious political motive for prosecution.* Evidence of such a motive could be the disproportionate burden of potential prosecution borne by a particular group, significant public or political pressure to find and prosecute wrongdoer(s), a proven animus on the part of political elites or prosecutorial authorities, and/or the specific selection of a trial or trials to serve politically expedient ends or to assist in a broader process of transitional justice.
2. *The accused are political foes or regime adversaries.* Most obviously, they could be charged with political crimes such as espionage, sedition, treason, or breaches of national security and terrorism laws. But this need not be the case. Typically, the crimes alleged are ones where motive may or may not be an essential element of the offence but even so is an important distinguishing feature. After all, "crimes of conviction" are not usually committed for selfish purposes or private gain.

3. *In domestic trials, the charges are often not about “past acts” but about the potential for future action.* Thus political trials often centre on conspiracy-related charges, and the focus is on the prevention of harm and on the “security” of state and society. Conversely, in international trials, didactic success requires a focus on “past acts,” albeit in a broader political sense so as to symbolize a break with the past and to establish a new basis of security and stability for state and society.
4. *The trial itself transcends its “normal” social role and is both ideologized and sensationalized by the media and political elites as representative of a larger conflict, be it domestic or international.* The trial thus becomes a key site of political contestability rather than a means of routine adjudication regarding the guilt or innocence of a particular accused.
5. *Successful prosecution is an example of didactic legality – that is, the trial has a larger pedagogical function beyond the assessment of the guilt or innocence of a particular accused.* Following both Shklar and Douglas, didactic legality can be understood as a function of legalist ideology, in turn serving an overarching explanatory or ideological system that has an important legitimation function. Successful prosecutions (not necessarily trials where convictions are obtained) can reinforce the rule of law and a regime’s commitment to due process and trial fairness. Didactic legality is equally applicable to domestic and international trials.
6. *The trial is accompanied by widespread public fear.* Hysteria is often stoked by political elites and fuelled by media speculation in a symbiotic manner. Conversely, public paranoia or a sense of conspiracy can destabilize didactic outcomes.⁵⁶
7. *A fixation on the confessions of the accused, and suspicious circumstances regarding the manner in which those confessions*

⁵⁶ This was arguably the case with the truncated Milošević trial at the ICTY, where any efforts at pedagogy or didactic success on the part of the international community were drowned out in Serbia itself. There, the trial was watched like a daytime soap opera, with Milošević and Serbia cast in the role of the victims, and myriad conspiracy theories accompanying each dramatic moment or event. This was evident even after the death of the accused: his supporters accused his captors of murdering him by poison, a theory discredited by independent autopsy.

were obtained. Behind extracted or “voluntarily” false confessions is often the expectation of “actionable intelligence,” useful for uncovering further plots and identifying webs of informers and potential perpetrators – such that there is a real risk of guilt by association. Here, the risk of detention or prosecution is disproportionately borne by a group often identified by ascriptive characteristics (religion, ideology, ethnicity, place of origin). Confession also facilitates public denunciation and legitimizes the trial process, while generating Manichean us-versus-them understandings of the threat represented by the accused. Conversely, the absence of confessions combined with either ambivalence or the staunch denial of guilt on the part of the accused can raise doubts with respect to the procedural fairness of both trial processes and trial outcomes, regardless of the verdict generated.⁵⁷

8. *The frequent use of secret evidence.* Political authorities will argue that secrecy in political trials serves many salutary functions in protecting national security, and in any event is structurally unavoidable given the nature of information collection by security and intelligence agencies. Informer privilege is often legally protected, and investigations must often be conducted under the veil of secrecy – first, so that suspects do not evade detection, and second, so that security threats are not increased in the process. However, secrecy contravenes a basic principle of trial fairness: that an accused be able to make full answer and defence to the charges levelled against her or him.

As with all else when it comes to trials, none of these factors is easy to “prove.” For this reason, trials must be understood in their social, political, and historical context, for only in this “embedded” sense can one explore or debate the possibility of political motives, the salience of

⁵⁷ Lack of confessions or worse still, confessions that are partially or wholly retracted during the trial, can result in didactic failure. The innocence of Julius and Ethel Rosenberg was debated for decades following their execution precisely because they did not confess; they became heroic symbols of resistance. The equivocation and verbal acrobatics of Nikolai Bukharin – who clearly strayed from the script of his 1938 trial – threatened to undermine Vyshinsky’s prosecutorial strategy, yet the outcome was assured nonetheless: the execution of the accused. Like the Rosenbergs, however, Bukharin became a symbol of resistance and came to represent all that was decent and humane about the Revolution. He is popularly remembered as intelligent, caring, and deeply committed to the welfare of the proletariat.

political crimes, or the broader political drama that the trial has come to represent. We are reminded here of Shklar's caution that a trial does not take place in a vacuum and for that reason needs to be situated in the complex of institutions, habits, and beliefs of which it is necessarily a part. Categorizing a trial as political is not and should not be easy, for it requires more than a straightforward legal and procedural analysis of the trial process. Also required is detailed historical knowledge of the context of the particular trial; a social-scientific methodology for determining the role(s) of the trial in terms of larger political conflicts; a Foucauldian cultural and anthropological awareness of the ways in which power is deployed and constituted through trials and the delivery of verdicts; and an awareness of the nexus between the conduct of the prosecutorial authorities and production of knowledge resulting in didactic success or failure.

Some trials, though suspected of being "political," and however they are viewed by those on both sides, should not be labelled as such without careful analysis and (sometimes) the passage of time. Because political trials are often conducted in a cultural universe dominated by state control, restricted media access, or outright denial of free expression, access to information can be limited. Even in societies that treasure and entrench free expression, either historically or constitutionally, legal limitations may prevent full disclosure to trial participants, perhaps for reasons of official secrecy or national security. In such cases, history must be patient in its judgments. It is worth remembering that many prominent diplomats and seasoned journalists (as well as the "true believers" in the various communist parties and sympathetic movements in the West) believed that the Moscow show trials of the 1930s were legitimate or, at a minimum, felt that where there was so much smoke, there had to be at least some fire.⁵⁸

⁵⁸ Walter Duranty, Moscow correspondent for the *New York Times*, whose 1932 Pulitzer Prize for his glowing reports of the First Soviet Five-Year Plan has come under considerable attack in recent years, was an apologist for the trials as well. On the first trial in 1936, Duranty wrote: "It is inconceivable that a public trial of such men would be held unless the authorities had full proofs of their guilt" (Duranty 1936). More tellingly, after the second trial in 1937 he noted: "It is a pity from the Soviet viewpoint that no documentary evidence was produced in open court." He then concluded: "Taken all in all, the trial did 'stand up'" (Duranty 1937). Joseph Davies, then U.S. Ambassador to the Soviet Union, with unknowing prescience commented in a dispatch to Washington that to suppose the 1937 charges were invented "would be to presuppose the creative genius of Shakespeare and the genius of a Belasco in production" (in Kadri 2005, 192).

Once trials are classified in accordance with these criteria as political, it may make sense to categorize them. Becker's categories, while less tested than Christenson's, in some respects are more useful because his focus is more on process: Do trials become politicized "accidentally" or owing to larger and deliberate state direction? Clearly, both trials in jurisdictions that respect and entrench the rule of law and those in jurisdictions that do not can be classed as political trials. However, Becker's distinctions remind us that we must consider the ways and means in which trials deserve the label, while bearing in mind that label is not necessarily pejorative.

It is tempting to suggest that, in states that have progressively "evolved" with respect to the entrenchment of the rule of law (and democratic norms more generally), political trials are, or ought to be, a thing of the past. However, the many similarities between the Cold War and the current War on Terror regarding the ways and means in which justice is politicized indicate otherwise. Moreover, especially in times of political transition, or as means of establishing sustainable peace, the international community collectively, or emerging states acting alone, will sit in judgment of particular individuals, who are either leaders of or proxies for fallen or discredited regimes. These kinds of political trials, with their potential didactic value, will no doubt continue, and the success of their outcomes will be measured politically as well as legally and judicially. For these reasons, it will continue to be necessary to recognize political trials when and where they occur, and to bring depth and rigour to such analysis. No simple definition will likely ever suffice, but I hope that the criteria outlined above will stimulate the debate. As Judith Shklar suggests, public discussions and detailed analyses of such trials – either by the mainstream media or by the academic community – will always do so, as they represent par excellence the ideological clash of legalistic and political senses of justice. The memorable stories contained in such trials are representative and archetypal; they are also constitutive of political identity, both of the nationally constructed "self" and of the internal or external "other." In the end, significant political trials and their often contestable outcomes shape our ideas about justice and the law more generally, whether or not they are capable of resolving some of our more pressing and fundamental societal and security dilemmas.

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