POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By *Otto Kirchheimer.* (Princeton, N. J.: Princeton University Press. 1961. Pp. xiv, 452. $8.50.)

PROFESSOR Kirchheimer of Columbia University and the New School offers a weighty contradiction to Aristotle's fond delusion that "the law is reason unaffected by desire." In brave leaps and broad bounds across time and place, the author proceeds topically to examine the many guises that political trials have taken, and assume today. He took on a task of large magnitude and great complexity. The story of political justice involves governments, political parties both legitimate and illicit, judges, lawyers, and defendants. It ranges from medieval proceedings to the Hiss and Eichmann causes and to the 1961 term of the United States Supreme Court. Considering the scope of this work, it is very much to Kirchheimer's credit that he kept control of almost all the many threads from which he wove this narrative.

He lets the reins slip only rarely, and perhaps because the author is more at home in European sources than in matters concerned with the United States. As an example, the footnote on page 137 contains minor errors. A mistake of greater significance occurs on page 407, where Kirchheimer suggests that Lincoln's 1863 pardon program had little immediate effect. The evidence points to a sharply different, if not opposite, conclusion.

Kirchheimer has not merely catalogued *causes célèbres.* Rather he picked and

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chose, primarily from Europe's history, for instances of political justice and injustice that illuminated his thesis. Some readers may protest that the author concentrated on Western Europe, but omitted comment on Spain or Latin America. There was quite enough to occupy Kirchheimer in what he undertook. His omissions suggest the need for a companion volume rather than an imbalance in the present one.

I find more to criticize in the topical organization that the author employed. It led to piecemeal reporting and analysis and to repetitive summaries. This organization, together with the "academic" prose style that dominates and strait-jackets the flow of narrative, makes progress through the text glacially slow. Ironically, Kirchheimer in a footnote describes a book as a story "told in stilted narrative." So is this one, except for infrequent and welcome flashes of warm, vivid imagery.

This is, nevertheless, a learned, successful, and significant work. For the first time, a reliable, thorough guide is available to those power mechanisms functioning through the courts that have played such an important role in the development of modern nations. These mechanisms, Kirchheimer depressingly concludes, promise further to expand the use of political trials even in the free lands of the world. More than ever, courts will be involved in politics, if only because cold war pressures are almost everywhere bringing forth enlarged internal security programs.

Whatever the pattern for the near future, Kirchheimer deserves the gratitude of all those who seek guidelines from the past. His book is destined for extensive use by workers in constitutional history and by all students of history and government. I hope that makers of policy as well as scholars read it.

University of California, Los Angeles HAROLD M. HYMAN

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couraged in the interest of his writing-it-out, since it is, after all, as a writer rather than as a tough guy that he interests us.

There is a Verlaine-like charm in the refrain he repeats throughout *Deaths:*

doing the limbo bit
doing the limbo bit
it's good enough
for me

But I see no charm in the sadistic note often struck, as:

Why do that,
why
not leave
violence
alone?
Because
said
when learn
do this
can
give
penknife
away
So long
as
you
use
a knife,
there's
some
love
left.

At the risk of being tedious, and of questioning the logic of a century and a half of romanticism, I say that not using a knife is a more convincing demonstration of "some love left" than using one. It is time to give away that penknife, I think. And is doing the limbo bit really good enough for a writer as talented and ambitious and, for all his hipster-movements to avoid it, as hooked on political protest as Norman Mailer is?

Life is one thing, art is another, to be even more tedious. Hemingway confused his life with his writing in his later years and of late Mailer seems to be doing the same. The danger is that he will, like Hemingway, try so hard to live up to his literary personality—a more destructive one than Hemingway's was, by the way, because the period we live in is more destructive—that he will have slight energy left over for writing; or, worse, that he will write so as to maintain his public image. Too much of *Deaths for the Ladies* is Hemingwayesque muscle-flexing against the squares (but Hipsterism can be pretty square too); there is too much tough-stuff, too much I've-been-around stuff. The great hope is that Mailer is more conscious of himself and brighter than Hemingway was; also, for these reasons, he has a much better sense of humor. And humor, as I observed at the start of this sermon, is the salt that keeps a great deal of Norman Mailer's recent work fresh.

LAW & POLITICS

POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By OTTO KIRCHHEIMER. *Princeton University Press. 452 pp. $8.50.*

Reviewed by C. PETER MAGRATH

BEGINNING WITH THE succinct observation that "Every political regime has its foes or in due time creates them," Professor Otto Kirchheimer of Columbia University and the New School for Social Research has written a learned treatise on what he calls political justice—the manipulation of the modern state's legal machinery by power holders, and, conversely, by power challengers. The question of what is and what is not "political" may present a pitfall, but Kirchheimer very sensibly labels as political that which dominant groups and individuals conceive "to relate in a particularly intensive way to the interests of the community." Such a definition allows for shifting conceptions of what is politically significant: to Henry VIII his spouse's failure to inform him of her premarital loss of virginity was treasonable; to the Nazis Jewishness was a crime justifying the imposition of brutal political sanctions. One could, of course, describe all justice as political, since without the authority of a public (political) order no legal system would be possible. But Kirchheimer's focus is on a reasonably distinct segment of justice: the use of statutes, courts, judges, public prosecutors, lawyers, juries, and defendants (also, perforce, part of the political-legal machinery) to affect power relations.

The theme is broad, but Kirchheimer stays close to his concern with the forms, motivations, and ends that characterize the

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a modestly comfortable level of living), Mr. Harrington therefore concludes that between 40 and 50 million Americans now live in poverty, real poverty, the kind one reads about in Gorky or Zola, the kind that was described by President Roosevelt in his "one-third-of-a-nation" speech. It's now, after almost a quarter of a century of the greatest prosperity we have ever known, perhaps reduced to one-fourth-of-a-nation but that is still "a massive affliction."

Mr. Harrington describes very well the psychological effects of this poverty—the alienation, the violence, the desperation, the apathy—and one thinks of Norman Mailer's attitude toward American society. But there is a crucial difference: the last word does not apply, since Mailer has never been impoverished: he went to Harvard, he wrote one of the biggest postwar best sellers, he is definitely not a citizen of The Other America. The alienation felt by the one-fourth of a nation that Mr. Harrington has anatomized is a blind reaction to an intolerable situation, but Mailer's is willed and conscious. Therefore he should be able to raise a banner more inspiring than the one he now marches under. I don't mean Sartrean commitment or Russian social realism, which are restraints—accepted from either masochism or priggishness according to one's temperament—on that ego which the artist must express freely if he is to be more than a hack. And I don't mean a regression to Progressivism or romantic Marxism. Between these over-politicalized extremes and the solipsistic rebellion of Hipsterism there is some ground and perhaps the most fertile for Mailer since he (rightly) refuses either to subordinate his ego to politics or to leave politics alone. In *Deaths for the Ladies,* he implies a criticism of society, but it remains an implication, drowned out by the author's personal histrionics; he seems uninterested in, and even unaware of, the factual existence of the society he is criticizing: perhaps this is a reaction from his former over-politicalization, but the reaction has gone too far. If *cancer* is to be his key metaphor about American life, he should know what he's talking about and one should feel some connection between a book like *The Other America* and one like *Deaths for the Ladies.* But one doesn't because, although both authors have detected sinister shapes far down in the placid waters of our prosperity, Harrington has really looked down there while Mailer has merely looked into his heart—and found not Calais but Cancer engraved thereon. He should be more aware of what's going on Inside America—he's already an expert on Inside Mailer. A political Hipster seems to me a contradiction in terms.

ONE LAST sermon and I'm through. There was a controversy some years ago between Norman Podhoretz (writing in *Partisan Review*) and Norman Mailer (writing in *Dissent*) about the moral significance of the killing, in the course of a holdup, of an aged candy-store proprietor by some male teenagers. As I recall the argument, Mailer saw the killers as rebels against bourgeois society whose act expressed a heroic *élan vital* because they dared to risk arrest and the electric chair. (I hope they got life—I'm against capital punishment because, not being a hero, I abhor killing.) Podhoretz saw them as simply juvenile delinquents, typical of the young toughs who were then more of a menace in the city than they are now, and he thought it the opposite of heroism for a gang of youths to kill an unarmed old man. As the loaded terms in which I've presented the argument shows, I agreed with Podhoretz. Now, I know Norman Mailer fairly well, and he is not anything like those young punks; but he has a romantic notion that violence is creative and that only a coward will avoid a fight; he has proved his courage more than once, I gather—and all the more so since he often comes out on the short end. Although he is, at least when I've seen him, the most patient and genial of men, Mailer is infatuated with the *idea* of violence; he thinks it proves something—manhood, sincerity, love, God knows what. And so, as in his writing he is always running it out to the very end, trying to see how much the traffic will bear, in his life he also pushes things as far as they will go, and often a bit farther. His literary extremism and *je m'en foutism* offend the academics, and the same qualities in his philosophy of life get him into trouble with the police. I think the academics are wrong, but I think the cops have a point, though they aren't the ones to enforce it, namely, that Mailer's living-it-out should be dis-

relationship between politics and law in the modern state. Yet his notion of political justice is necessarily so encompassing—touching on famous treason trials, political defamation suits, legal repression of political organizations, asylum and clemency—and the frame of reference so wide-ranging—the United States; the Soviet Union; the Weimar, Nazi, and post-World War II German regimes; and the periodically changing French systems—that the book seems almost encyclopedic. Some may conclude that it is indeed essentially a reference work. Yet, throughout, runs the connecting link of Kirchheimer's conviction: that political justice, which frequently turns into the epitome of injustice, is an imperative which states cannot escape. No one can put down Kirchheimer's large-scale study without having acquired a new insight into the way modern governmental systems make political use of law and legal apparatuses.

INDEED, ALMOST EVERY chapter offers a few refreshing insights. Kirchheimer points, for example, to the troublesome dilemma which hostile minority groups create for democratic governments: that repression, when it is "foreseeably effective . . . seems unnecessary; when advisable in the face of a serious threat to democratic institutions, it tends to be of only limited usefulness and it carries the germs of new, perhaps even more menacing dangers to democracy." This "limited usefulness" arises from the fact that, though seriously threatened, democratic regimes often find it expedient to repress minority groups when these represent significant interests and portions of the population. Thus, the Weimar Republicans in the late 1920's had to contend with the dual threats presented by the Nazi and the Communist parties. And the postwar Italian and French governments faced a similar problem in dealing with the militant and well-disciplined Communist organizations. As Kirchheimer observes, "Any attempt, repulsive per se to a democratic society, to deflect such mass aggressions into government-chartered and government-operated channels, would be likely to line up easily maneuverable cohorts of uprooted men under orders—another mortal threat to the democratic process." The practical consequence of this is that only a stable democratic regime, for instance that of the United States, can afford to repress hostile minorities. And yet, precisely because it can repress—the minority is insignificant; the revolutionary appeals it makes fall on deaf ears—there is the least objective need to do so.

Kirchheimer is much too worldly-wise to believe that this ends the matter. While an anti-democratic group may not be an "objective threat" to the established government, the holders and manipulators of power may choose legal repression for any number of political and psychological reasons. By firmly suppressing the neo-Nazi Socialist Reich party and the Communist party, both weak and numerically small, the West German Federal Republic responded to a number of factors and served a number of ends: it reacted to the bitter experience of the past with anti-democratic groups; it enhanced its world image as a new nation which rejects Nazism and takes a "no-nonsense" attitude toward anti-democratic forces; and (in outlawing the CP) it aligned its domestic policy with its "hard" foreign policy line toward Moscow. Similarly, the United States government's policy toward the Communist party in its midst (a policy which, in practice, if not in form, aims to destroy the party) is heavily influenced by the desire of our political leaders to demonstrate their vigilance in guarding America against the threat of Communism. I would suggest, too, that this reaction ties in with the felt need of the American people to lash out at their tormentors in one of the few tangible ways short of war that seems open to them.

For his part, Kirchheimer here favors a policy of toleration as harmonizing with democratic theory; he argues that legal repression against weak anti-democratic groups damages "the ligaments of democratic institutions." The discussion significantly underlines Kirchheimer's general observation that permanent repression of hostile mass organizations is inexpedient while repression of tiny minorities is unnecessary. If this conclusion in itself may seem even trite, it nevertheless conveys a profound truth: that only by removing the causes of mass dissatisfaction can a regime attain the luxury of not needing to suppress hostile minorities. It is a conclusion that one wishes would sink through to the rulers of

a country like South Vietnam—and to the American Congress when it votes on foreign trade and aid bills.

THUS, DESPITE A COOLLY analytical approach, Kirchheimer does not shy away from expressing his views on such questions as the legal repression of minority organizations, the correctness of the Nuremberg War Crimes Trials, or the thoroughly politicized legal systems characteristic of totalitarian states. In this respect, he is unlike those many writers in the social sciences who are addicted to a maddening neutralism which decrees that personal opinions are to be scrupulously avoided—a sort of forbidden fruit not to be tasted by social scientists. Nevertheless, an inconclusive tone does permeate Kirchheimer's study—a fascination with ironies and "sociopolitical paradoxes." He ends his chapter on "Legal Repression of Political Organizations" by commenting on the irony that forces those who advocate repression in a democratic society to justify each repressive act, adding, "Is this not at least a remarkable testimonial to the merits of constitutional processes rooted in the democratic system?" He concludes the book by invoking Clio, the Muse of History, who, "in her compassion may hide from both defendant and judge what and whose titles will eventually be disproven." And Clio may well refuse an unambiguous answer, indicating that both were on fools' errands. "Meanwhile," he writes, "may we pray for both potential brethren in error?"

To an extent, Kirchheimer's disinterestedness and his fondness for paradoxical observation and ironical questions bespeaks an understandable skepticism about the exaggerated claims of rightness raised by those who are participants—either as users or used—in the drama of political justice. But beyond this, Kirchheimer's resigned and quizzical tone reflects a deep pessimism overlaying his personal humanitarianism. He expects little from man; at the very best, man may refrain from treating his brother with inhumanity, but never will he show much capacity for justice. "To the past, present, and future victims of political justice," Otto Kirchheimer dedicates his book. That, inevitably, there will be future victims of political justice is the implicit assumption which binds this multifaceted work together.

A JEWISH ARISTOTELIAN

JUDAISM AS A PHILOSOPHY: THE PHILOSOPHY OF ABRAHAM BAR HIYYA. By LEON D. STITSKIN. *Bloch. 251 pp. $4.50.*

Reviewed by JEROME ECKSTEIN

AN INTEREST AND importance that it might otherwise not have had is given to this work by the "imprimatur" it bears of the Yeshiva University—the first time the school has chosen to extend such special approval to any publication. Thus the book must be taken not only as conveying the viewpoint of its author (who is Professor of Jewish Philosophy at Yeshiva's Graduate School) but as being a quasi-official expression of a respectable segment of American Jewish Orthodoxy. Unfortunately, this group becomes co-answerable for Professor Stitskin's weaknesses in argument.

Professor Stitskin, in his turn, has made the similar mistake of insisting that the views of a single medieval Spanish Jewish thinker, Bar Hiyya (1065–1143), constitute an official philosophy of Judaism ". . . unique in its insights and timeless in its essence." But no philosophy has as yet demonstrated its absolute certainty—not even that of Aristotle, whose conception of the universe Bar Hiyya depends on. Rejecting all modern and non-Aristotelian philosophy—and retaining even, by implication, Aristotle's astronomy—Professor Stitskin must needs invoke the *deus ex machina* of revelation and faith every time he is confronted with a contradiction or difficulty.

Not only does Professor Stitskin believe that "Aristotle projected a world picture which formed a *perfect* [my italics] background for an adequate appraisal of man's rational soul," but he tries to prove that many of the metaphysical categories basic to Greek philosophy are anticipated in the Bible. In support of this astonishing view, Professor Stitskin invokes Judah Halevi, Abraham Ibn Daud, Maimonides, and "even non-Jewish writers" (he refers especially to Eduard Munk who wrote in 1848). And he cites Josephus (without reservation) as quoting another author's beliefs that Pythagoras was a disciple of the prophet Ezekiel; that Socrates derived his concepts from Achithophel and from Asaph, the Psalmist; that

area of science and behavior. A large number of source notes is included.

HILLIARD A. GARDINER

KIRCHHEIMER, O. *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton: Princeton University Press, 1961. Pp. xiv, 452.

The term political justice as used in this book adverts to the utilization of the devices of justice to bolster or create new power positions. Its aim is to enlist the judiciary in behalf of political goals. In the first of three parts, the cases, causes, and methods of political justice are treated, the nature of the changes in the structure of state protection in recent years as contrasted with earlier practices being

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initially defined. The political trial and the various types of legal repression of political organizations are then considered. Resort to the courts may be of necessity, choice, or mere convenience. The political trial may involve a common crime, the exploitation of which may be politically advantageous, or the subjection of an opponent to public incrimination or defamation, perjury and contempt. *Causes célèbres,* like those of Caleb Powers for the murder of Governor Goebel in 1900, Joseph Caillaux for treason against France in 1918, and Reich President Friedrich Ebert's defamation action in 1924, are used illustratively. The nonconstitutional trials of Andre Bonnard in Switzerland, Otto John and Heinrich Agartz in West Germany, and various defendants in Communist countries and Nazi Germany held after the second World War are described to demonstrate how the area of politically prohibitable activity has been enlarged. That the trial is a manipulable technique in the process of repressing hostile groups, even within the framework of democratic institutions, is affirmed in Part One's historical and analytical account of the forms of treatment applied by established regimes to opposition groups.

In Part Two, the organizational and societal framework for judicial action within a constitutional and one-party regime is described. Here there is much that will interest the student of comparative law, ranging from an account of judicial recruitment on the continent and in Anglo-American practice, through a consideration of varying approaches to the prosecution of political deviation. The judge gets the major portion of the attention; though an occasional participant in the community's vital policy actions, he checks, remodels, or forces changes through "interstitial" action, invokable only when sought after. In the heterogeneous society, the absence of commonly accepted starting propositions precludes impartiality; where there is homogeneity he may be a mere shuffler of legal technicalities. Such is suggested to have been the case in the trial of the American Communist Party in 1949, illustrative of the international nature of the twentieth century political trial, serving, as it does, as a focal point for political strategy throughout the world. Within the Soviet orbit, to which this proposition necessarily applies, the goal is maximal harmony between judicial activity and official policy, with every case "ideally" decided in the light of the contribution renderable to the momentary program's fulfillment. Here the content of legality shifts to permit enforcement of norms deemed within "points of concentration." Germany's National Socialist regime is distinguished as never having had as its goal any basic change in property relationships and social stratification; the law's continuity was insisted upon while its revolutionary features and innate lawlessness were conveniently overlooked. Trial by fiat of a successor regime, as exemplified by the Nuremberg war crimes trial, is considered finally in Part Two, with attention specifically directed to four of the defense's rejoinders and the general question of jurisdiction in cases of this nature.

Asylum and clemency, devices for the countermanding of the course of political justice and the frustration of its effects, are discussed and analyzed in Part Three, in the course of which practices and customs in different jurisdictions are compared. How the shifts in political constellations and usages affect the approaches of adjudicating and adjudicated, how they intermesh with time-honored practices and traditional principles, and how they relate to the irreducible remainder beyond rational determination are political issues to which attention is directed. In the Soviet Union, for example, traditional nineteenth

century notions of political asylum as a noble service to be granted to the politically persecuted clash strikingly with a practice that predicates refuge upon the individual's serviceability to the party machine. Some vestiges of hallowed tradition, that America is a haven to all comers, exist in the United States, although three decades of restrictive immigration policies have narrowed the scope of asylum chances. Great Britain most steadfastly upholds a liberal asylum tradition, while West Germany's Basic Law is permissive, but the list of countries neglectful of asylum principles is considerable. Necessarily, present day conditions involve governments in economic, public welfare, and administrative headaches, dealing as they must with huge masses of the politically persecuted, but, as is the case with the clemency device, where some subjectivity seems warranted in the light of humanity's present performance, political asylum appears vindicable in a deeply divided world, setting, as it does, some limit to any regime's power.

Professor Kirchheimer, by seeking to relate political content to juridical form and exposing it, performs, by this act alone, a notable service. Because justice in political matters is more tenuous than in any other field of jurisprudence, and because our international professions rarely coincide with our politico-national practices, his use of materials from many sources to evolve a less diffuse notion of what surrounds us warrants an accolade. He convincingly develops the theses that every political regime has its foes; that courts sit in readiness to settle conflict situations, and in so doing, eliminate political foes according to prearranged rules; and that beyond their power to authenticate official action, the courts have become a dimension through which many regimes can affirm their policies and integrate the population into their political goals. The sweep of his scholarship is immense; he ranges over Greek, Roman, European, and American referents; he historifies, he classifies, he analyzes, he compares. His toughmindedness shows through in many a well-turned phrase and jugular characterization. But his direction, more often than not, seems uncertain, and his value system, more frequently than less, seems vague. Political justice is on the one hand denigrated, and on the other, condoned. The "judicial space" within which it is found to be operative is not sufficiently defined to give to it a functioning personality. It is an "eternal detour, necessary and grotesque, beneficial and monstrous"; without political justice and the intercession of the judicial apparatus, the fight for political power "would be less orderly." It begins to fill all voids and in the process of being neutralized prompts evocation of the question whether it is not indeed consonant with justice. To this question an answer is wanting. One can understand why it is of importance for the Supreme Court of the United States to decide whether a question is justiciable or political; if the latter, the result, if one follows, is not of the Court's direct making. Why justice should be subdivided in the present endeavor requires clarification, which may well be the very next undertaking that the author embarks upon.

HILLIARD A. GARDINER

PALMER, N. D. *The Indian Political System*. Boston: Houghton Mifflin Co., 1961. Pp. x, 277.

India is undoubtedly the pivotal country in South Asia; where she goes politically and economically over the next decade will determine in large measure the fate of the rest of South Asia, and probably much of the rest of Asia as well. It is thus fitting that attention be directed to this addition

BOOK REVIEWS

KIRCHHEIMER, OTTO, *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton: Princeton University Press. 1961. xiv & 452 pp. $8.50.

"The aim of political justice is to enlarge the area of political action by enlisting the services of courts in behalf of political goals." Political recourse to the courts occurs in a variety of circumstances. It involves, of course, a distortion of the judicial process; at the same time, the characteristics of that process supply conditions, some advantageous, some disadvantageous, to the pursuit of the political goal.

It would be hard to conceive a literary project more ambitious—or more forbidding—than an analytical study of political justice. There is needed first of all the mastery of a great mass of historical detail, for the study must rest on empirical data; and these data must be evaluated. The author must be familiar with all the legal systems involved in his data. But these needs are only the beginning. The events must be oriented in a historical scheme; they must also be made to yield a categorical analysis which exposes the necessities, the implications, and the consequences of political justice. Imagination and a high degree of creativity are required. All these conditions are met in the book under review. Some hundreds of cases contribute at one point or another to the discussion; several receive extended consideration. They simultaneously underpin and illuminate the historical and analytical treatments.

For most of human history the legal offense of disrespect for authority—the *crimen laesae majestatis*—has been punished as a matter of course. During the nineteenth century, in western Europe and the United States, where the ideal of constitutionalism had taken root, this "system of state protection" was "hesitant and conscience-stricken." Since the First World War, however, it has been restored to full vigor. The "crime of social dissolution," to adopt the expressive Mexican term, has been introduced almost everywhere. The French, German, and American codes are very elaborate; only Great Britain and some of the Commonwealth nations have adhered to the nineteenth century tradition.

In part social factors account for these changes. The outlook of the nineteenth century was that of the middle class. The middle class had made its gains through opposition to government, and still identified itself with dissent. Moreover, the middle class inherited the optimism,

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the rationalism, and the attachment to certainty of the Enlightenment. For the first time there was a public opinion hostile to political justice. But today, in mass society, public opinion is uninformed, uncritical, and irrational; it applauds political prosecutions with enjoyment of the spectacle heightened by moral indignation at the victim.

Political factors also played a part. The nineteenth century saw the apogee of the national state. The tendency was toward indulgence of internal proposals of change; traffic with a foreign enemy was "the deadliest of all sins." But international communications have recast value systems in the twentieth century: economic interest groups, fascism, and communism have in their various ways deprived the state of its monopoly of loyalty. These very developments have produced more violent assertions of state patriotism on the part of the popular masses. The upshot has been the enactment of penal legislation which identifies the ideological crime of social discontent with aid to a foreign enemy. The imprecision of the concept of "subversion" makes possible the conflation of the two offenses, and its vagueness makes the word more sinister and menacing.

But these illuminating historical insights are a side-issue. The principal concerns of the book are to establish types of political justice and to examine the constituent elements of the political trial. The most obvious case of political justice is the bill of attainder, the outlawry of a dissident group. When a ruling minority undertakes to destroy popular organizations, there is usually no ulterior purpose; the goal is simply repression of opposition. Execution of the political policy collides at points with the legal order, which the government is unwilling to scrap altogether; even the opponents of the racial laws of South Africa have found some shelter behind the structural beams which are necessary to support any legal system. But most contemporary acts of repression—the American anti-communist legislation, and the suppression of the Socialist Reich Party and the Communist Party in West Germany are considered in some detail—are not intended to protect the regime from any real threat. The American legislation resulted from a competition in demagoguery. The Socialist Reich Party was suppressed for no other reason than its insolent behavior. The suppression of the Communist Party by the German Constitutional Court was principally intended to buttress the foreign policy of the government.

Other forms of political justice do not involve the proscription of a group by name. Statutes of a more conventional sort are passed prohibiting one or another action, speech, or opinion; or the defend-

ant is charged with an offense drawn from the ordinary criminal law. Civil actions, such as libel suits, may also serve political ends. A special class of actions is the trial of a predecessor by a successor regime, as in the Nuremberg trials, which are considered at length. In most cases political justice aims at public opinion rather than at the ostensible victim: the purpose is to vindicate a regime or a candidate or a policy by establishing an image of the opponent as an enemy of the common good.

Thus the political trial undertakes to recast history into a desired pattern. By focusing on a single event, to which are attached both decisiveness and culpability, it radically distorts the subject; but of course distortion is the purpose. The political trial is a morality play. The characters are the judge, the jury, the lawyers, informers, and the parties. Usually the state is one of the parties; and it also supplies the stage directions. In interpreting their roles the actors enjoy a certain latitude. How great this is, and how it is used, depend on many circumstances; these the author explores and illustrates.

A chapter is devoted to asylum, and another to clemency. These arise in such widely varying situations, and discretion plays so large a part, that systematization cannot proceed very far.

It is clear that Dr. Kirchheimer does not attribute entire objectivity and certitude to the judicial process at its best. His approach is a blood-chilling legal realism. Consequently he takes for granted both the inevitability and the injustice of political trials. They have, however, this merit: they are a part of the struggle for political power, and without them the struggle would continue in a less orderly way.

Judicial process has as its objective the solution of problems in terms of truth and reason. When the magnet of power enters the field, must the needle invariably swing to the new pole? *Political Justice* recounts a few cases in which this did not occur, but these must be regarded as exceptions to the rule. The dispassionate accuracy and the profundity of the book make the conclusion the more depressing.

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LONGAKER, RICHARD P. *The Presidency and Individual Liberties.* Ithaca: Cornell University Press. 1961. xii & 239 pp. $4.50.

Apprehensive of unrestrained and concentrated power, the men at Philadelphia drew the lines of the executive office in the United States as part of the framework of the separation-of-powers principle. Ham-

about: income distribution data *are* distorted by the expense account economy; taxation still remains largely regressive and more burdensome for low-income groups; and wealth is just as lopsidedly distributed as income. All this Kolko develops in satisfactory fashion. There are some minor differences between him and Harrington: he prefers a $3000 income cutoff to define poverty; the latter's is slightly more (Leon Keyserling goes even higher—to $4000!). And it is good to see that Kolko has dropped second-hand-car registrations as a measure of low consumption, an argument he offered in an early DISSENT article.

Perhaps the major flaw in the overall analysis stems from the refusal to acknowledge the decline of owner-domination in American industry. Here Kolko seeks to rebut the famous Berle-Means thesis; he insists, rather, that ownership and control are still identical. However, this conclusion, after all his research, has the character of a non-sequitur, particularly when he concludes that those who do control our major corporations own at most one-fifth of outstanding shares. Thus, dispersion of stock ownership is a fact, and attention, it would seem, must be focused on techniques of control. It is at this point that the sociology and economics of the corporation meet.

At any rate, both of these books are welcome antidotes to the euphoria of recent years. As Harrington so well puts it, there *is* another America, and it is high time we took a close look at it.

BEN B. SELIGMAN

Politics and the Rule of Law

POLITICAL JUSTICE. THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS, by Otto Kirchheimer. Princeton University Press, 1961, 452 pp. $8.50.

At the outset, Dr. Kirchheimer explains that his title refers not to "the search for an ideal order" but to "the most dubious segment of the administration of justice"—that whose function it is to "eliminate a regime's political foe according to some prearranged rules."

No wonder that to a man the legal profession—including some highly respected liberals such as Justice Douglas—has condemned the book, rejecting its basic contentions and attacking its scholarship. In a country much given to a positivistic approach which holds that "the law is what the judges say," it is still not considered proper to write, as the author does, that the judges say what helps to make the political regime workable. In an age that has allowed Freud to enlighten us on the earthy nature of our most sublime dreams, the administrators of justice still abhor the suggestion that Justice is anything but a flowingly clad virgin blindly weighing right and wrong in an ideal balance.

Had Kirchheimer confined himself

to the charge that occasionally Justice peeks out from under her blindfold, they might have agreed. Had he merely accused the justices at times of perverting the absolute ideal of Justice, they might have applauded his elaborate marshalling of the evidence. But this is not his concern, or only incidentally. His attack is directed against the very notion of abstract justice, the ideology by which the justices live and which sustains the confidence of citizens in the society in which they live. For a regime breaks down when people no longer identify the laws (and their administration) with such an ideal yardstick. The illusion of a "just" law, in turn causes people to bear even a severe, unjust regime. Hence the lawyers reacted to this book as though they had been stung, or simply refused to understand what the author tries to say.

It is not quite as easy to see why liberals, too, felt challenged by Kirchheimer's contention. Offhand, they should welcome a proof that the poor man or the non-conformist is always hung. But Kirchheimer has cut off the source of their indignation: by denying any absolute standard of justice, he deprived them of precisely the ideal which they accuse the establishment of perverting. Take the Dreyfus case, which still, besides the Zenger and the Sacco and Vanzetti cases, is the liberal's grand exhibit. A man was denied justice for political reasons, and not just everyman but the French courts, too, agreed what kind of wrong had been done him. Zola was condemned, then vindicated. Clemenceau led the just cause to triumph through a political trial. In this case the courts which ought to have defended the establishment, in fact were used for its discomfiture. Worse befell in the Sacco-Vanzetti case: an innocent man was condemned to die, and ever since, each death sentence by an American court threatens to become an international political scandal. But surprisingly, Kirchheimer does not deal with these cases, because in his view a martyr cannot be innocent, as Sacco and Vanzetti were.

This makes it very clear where the author parts company with the liberals. It is easy to rise in defense of an innocent man, and to rise the liberals need to believe their heroes not only innocent but on the side of the angels. But a radical, like Kirchheimer, will defend his hero precisely where he is guilty in terms established by the regime.

At this point, however, a strange circle closes, and by the author's admission it is a vicious one, from which he escapes only through prayer — not a very convincing proof of a radical attitude. For his approach does not permit us to distinguish between a rebel who suffers injustice for the sake of a majority and of democracy—say, Kenyatta—and one who tries to subvert or suppress majority rule. With his attitude Kirchheimer manages to remain objective and serene in describing, one after the other, the measures West Germany takes against communists and East Germany against the majority of its subjects. This position probably is hard rationality by academic standards, but is it as radical politically as the author wishes to be? There must be a difference between arbitrary government defending itself against democracy and democracy defending itself against usurpers; between, for example, Agartz, a West German labor economist, who posed as a bona fide trade union official but actually received subsidies from Ulbricht—and a person who tries to maintain contact with the

Protestant Church behind the Iron Curtain.

The comparison may well show the cause of this reviewer's misgivings. Agartz chose to be an undercover agent in an open society, rejecting its privileges of free speech and personal security. Kirchheimer admits elsewhere that an open, democratic society is helpless where a true majority movement tries to change the regime; but it obviously is entitled to apply to a conspirator the same harsh law of repression that he threatens to use in case of success. Had he wished merely to propagate his convictions, Agartz would not have had to violate any law. His Protestant counterpart cannot act —even if it were only to tell his friends that they must obey Ulbricht's laws— without violating the law. He therefore claims to speak in the name of Justice, and he probably would not act unless he believed this.

The concept of Justice hence is more than an ideology, and people who think they know "what is just" are not the victims of "a necessary delusion in an antagonistic society." People who fight for "Justice" know exactly what they mean, and they measure the justice of their regime by standards derived from ideas which have a content. Justice itself is a content to be fought for. In denying this, Kirchheimer has deliberately muffled the impact of an otherwise moving presentation. The harsh realities which, in the framework of his theory, stand out even more harshly, cannot fail to arouse the citizens to defend that justice which he says does not exist. And, remembering the dedication "to the past, present and future victims of political justice," we must suspect that while Dr. Kirchheimer's scholarly mind is debunking the academic ideology of "justice," his heart believes in the reality of injustice.

But Dr. Kirchheimer has forbidden himself to wax indignant. The literature which exists is either so highly principled that it never comes down to the consideration of specific issues, or so narrowly operational that it remains unaware of any issues. Kirchheimer has done something which to our knowledge has never been tried before. He has placed the operations of political justice into a precise sociological context and he has reduced the abstract principles to concrete political meanings. He reveals the conflict between the abstract principles which any code of law of necessity must pretend to follow, and the individual value system of this judge, that defendant or the present author. Since this conflict is inherent in any judicial system, the book uncovers the sources of genuine tragedy, particularly in the moving passages where the author discusses the role of the judge.

Place this book by the side of Godwin and Thoreau.

HENRY PACHTER

MOONSTRUCK

"Dr. Edward Teller told Congress today that the United States must, for its own security, gain control of the moon. . . .

"He said the country that establishes a working base there could control near-by space, and would be able to 'know what was going on everywhere on earth.'

"'We need the moon for our own safety,' he told a House Science and Astronautical subcommittee." — From the N. Y. *Times,* March 28.

YEAH, DO THAT

"BATAVIA, N. Y.—(UPI)—Larry H. Merrit, a trucker of Batavia, urged his friends recently to follow his example and build fallout shelters 'so when I come up after it's over, I can have a drink of beer with my friends.'"—N. Y. *Times,* Nov. 16.

personal or political freedom: not personal, since man has freedom only as a relation to other men; not political, since the political relation is just another social relation. Freedom is not the contrary of unfreedom, as a man is not unfree when he is forced to do something, yet not free in the doing of it, to refrain from doing it. Power and freedom can combine so that a man of inferior power is free on sufferance, though not free of sufferance, whereas his superior is free to dominate him.

Mr. Oppenheim discusses other meanings of freedom, descriptive and valuational; of the former, he repels the opinion that freedom is freedom of choice, because we are always free to do or to try the impossible. Freedom has a character so irremediably specific that we can in general speak only of a single relation of freedom, never of a free society made of such relations; freedom has dimensions but is not a whole. In his last chapter, Mr. Oppenheim explains the value of the scientific conception of freedom for the normative problems of freedom, which is nothing less than to make intelligent discussion of them possible for the first time.

Mr. Oppenheim values fruitful over colorful language; he has produced clear language. His book contains some alphabetical abbreviations, and a few neologisms ("counterintuitive" is a happy conceit), but it is free of jargon, and abounds in examples. In this effect, it is a contribution not only to behaviorism but to the controversy about behaviorism.

HARVEY C. MANSFIELD, JR.
University of California, Berkeley.

Political Justice. By OTTO KIRCHHEIMER. (Princeton, New Jersery: Princeton University Press, 1961. Pp. vii, 452. $8.50)

The use of legal procedure for political ends is most frequently associated with strongly authoritarian or totalitarian systems of government. This book is an important contribution to the study of courts in the political process, because it examines the role of the judiciary to gain certain political ends under constitutional systems. Professor Kirchheimer's systematic analysis of trials for various political purposes under constitutional and totalitarian systems stresses the problems which each system encounters in achieving the aims of the trial, the various forms of trials, the "dramatis

personae" participating in the political play brought into the courtroom, and pursues also the nature of clemency and asylum.

Assuming that "every political regime has its foes or in due time creates them," the author points out that the ensuing power struggles between the regime and its foes and among competitors for political power will take a variety of forms. The courts, which through show trials, legalization of purges and staged public confessions of political opponents of a system, have served as terror and propaganda instruments of totalitarian systems, do have an important, albeit somewhat different, extra-legal function also in constitutional systems.

As constitutional governments in modern times grew in scope and their political power came to rest on the broader bases of unlimited suffrage and extensive public opinion, conflicts arose within democracies which engulfed the judiciary along with the traditionally "political" parts of government. The author summarizes the most urgent occasions for court action in connection with repressive programs in contemporary non-totalitarian society in four categories: (a) formal restriction of freedom which becomes necessary for successful police and security operations; (b) control measures which have passed the dividing line between informal restraints and actual coercion and result in the victim's demand for formal adjudication; (c) the government in question has decided on either total repression of its foes or on wearing them down by continuous judicial proceedings against them which limit their political availability; (d) carefully chosen segments of deviant political activity are submitted to court scrutiny, not so much for repressive effects as for dramatizing the struggle with the enemy and gaining public support.

The problems which beset a constitutional system if it wants to take either one or all of the above steps involving the judiciary are complex, and Professor Kirchheimer points up these complexities by a thorough analysis of the Smith Act trials in the United States and the procedures involved in outlawing the Communist Party in the Federal Republic of Germany. He shows the greater dilemma confronting the United States judiciary, because constitutions of the "older liberal type" make the substantive determination of the sphere of permissible revolutionary action and propaganda quite problematic. Under the American Constitution the Supreme Court was forced to make specific acts on the part of the accused the basis of judgment. According to the rule of law it is not enough

to know that the group in question prepares a state of psychological readiness for future political action, and demand total repression. The position, however, calls for a constant alertness, frequent shifting of positions and relocation of battle lines between the governmental organization (and its instrument—the judiciary) and the hostile group.

The Bonn Basic Law, on the other hand, an example of a more recent constitution, drawn up as reaction against totalitarianism, clearly makes repression of antidemocratic political movements part of the rule of law. This enables the judiciary to consider a suspected group's perennial readiness to take action which will ultimately result in the destruction of the constitutional system as a sound basis for legal and complete repression.

It is this conflict between legal repression of political organization and constitutional systems based upon competing political parties and the writer's penetrating analysis of a troubling subject matter which make the book an important source for any scholar interested in political justice. The section on political trials under totalitarian systems pointing out difficulties even for those regimes to explain judicial involvement in political matters, and the massive documentation with sources usually not gathered within one volume, add to the significance of this book. The only question of "political justice" which to this reviewer could have been pursued in greater detail is that of impeachment. However, the scope of the book is so broad that not all aspects should possibly be treated in equal depth.

ELKE FRANK

Florida State University

The Moulding of Communists (The Training of the Communist Cadre). By FRANK S. MEYER. (New York: Harcourt, Brace and Company, 1961. Pp. 214. incl. index. $5.00.)

This is one of a series of studies of Communist influence in American life, supported by the Fund for the Republic under the general editorship of Clinton Rossiter. It is easily the best of the series, because it is the most authoritative. As a result, the reader is able to grasp the profoundly different character of Communist consciousness. As Meyer puts it: "For the Communist is different

responsible for the emergence of conflict subcultures. Cavan is also prone to make statements that are open to considerable doubt, such as "most juvenile offenders either smoke marihuana or use heroin." Despite its limitations, the book, if judiciously interpreted, will serve as an effective teaching device.

PETER G. GARABEDIAN
Washington State University

Changing Patterns of Military Politics. Edited by SAMUEL P. HUNTINGTON. Preface by HEINZ EULAU. International Yearbook of Political Behavior Research, Vol. 3. New York: Free Press of Glencoe, 1962. 272 pp. $7.50.

In the current era of international political power relations, the military establishment has assumed a top-level institutional posture while the military profession, by force of circumstances, is increasingly assuming political roles. Samuel P. Huntington, the editor of the present volume, is probably best known for his authorship of the 1957 book, *The Soldier and the State: The Theory and Politics of Civil-Military Relations.*

Huntington does not offer the present book as a sequel to this earlier volume. It is, rather, a collection of essays with an introduction and concluding overview by Huntington. In the introduction, Huntington discusses "The New Military Politics," followed by his essay, "Patterns of Violence in World Politics." Then follow the interesting essays by well-known authors: Harold D. Lasswell, "The Garrison State Hypothesis Today"; David C. Rapoport, "A Comparative Theory of Military and Political Types"; Laurence I. Radway, "Military Behavior in International Organization: NATO'S Defense College"; Raoul Girardet, "Civil and Military Power in the Fourth Republic"; Philip Abrams, "Democracy, Technology, and the Retired British Officer"; and Martha Derthick, "Militia Lobby in the Missile Age: The Politics of the National Guard." In his introduction, Huntington calls this collection of essays a symposium of papers which have neither common subject nor common method. He does, however, suggest that they will serve a common purpose in opening the door to fruitful research in what he calls "the new military politics of the 1960's."

To this reviewer the most interesting of the essays were those by Lasswell and by Derthick. These two essays are particularly current and deal with facets of the American political power structure under constant discussion in the mass media of communication. The preface to the volume, by Heinz Eulau, is also well worth the reader's attention.

Huntington has done an excellent editorial job despite the fact that the essays are almost totally unrelated to each other in frame of reference and content. Here is a volume that should certainly attract the attention, not only of social and political scientists, but also of other individuals more directly concerned with national political and foreign policy making.

CHARLES H. COATES
University of Maryland

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton, N.J.: Princeton University Press, 1961, ix, 452 pp., $8.50.

Students of the sociology of law will welcome this volume. A central question in this field, as put forth by Weber, is the manner in which authority is made legitimate. *Political Justice* grows out of Tocqueville's shrewd observation that "It is a strange thing what authority the opinion of mankind generally grants to the intervention of courts. It clings even to the mere appearance of justice long after the substance has evaporated; it lends bodily form to the shadow of the law." Hence, the subject matter of this book is the manipulation of the symbols of justice to achieve the ends of political goals.

In scholarly and learned fashion, Kirchheimer details a number of political trials as well as broader policies for utilizing legal machinery to put down dissident and opposing groups. He also examines the pressures structured into the legal system that fall upon judge, prosecutor, defendant, and lawyer in the political trial, and the limits of choice and opportunity open to these *dramatis personae.* All in all, it is a commendable book.

I have two reservations—one procedural and one substantive.

The book is not as systematic as it ought to have been. There is an interesting conceptual framework in the first chapter (based largely upon the ideas of Weber who, incidentally, is not cited), but the materials which follow rarely refer back to it explicitly. Consequently, one sometimes finds oneself lost in a maze of detail without being able to discern a conceptual referent.

The substantive criticism is as follows: Although the author sets out, as one of his categories of political trial, the "derivative . . . where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe," he fails to cite

Riesman's brilliant article (42 *Columbia Law Review* 1085) on the use of libel and libel law as a major political weapon. Thus, the Nazis turned the law of defamation on its head by publicly calling their Gentile enemies Jews. These opponents were then faced with an impossible dilemma: Either they sued for defamation, in which case they would be forced publicly to claim that "Jew" was a term of opprobrium; or if they did not sue, their religious identity might be in doubt, an unhappy situation in the Germany of the Thirties.

Whatever criticisms the book may merit, it breaks some new ground in a significant area, namely, the symbolic import of the semblance of a rule of law, even, and indeed especially, when substantive goals are being interfered with by formal procedure.

JEROME H. SKOLNICK
University of California, Berkeley

BOOK NOTES

Cities and Churches: Readings on the Urban Church. Edited by ROBERT LEE. Foreword by JOHN C. BENNETT. Philadelphia, Pa.: Westminster Press, 1962. 366 pp. $3.50.

For over a generation Protestant churchmen have been studying the impact of urbanization on their historically rural and small-town religious tradition. The present volume is a collection of essays dealing with the problems that urbanism has posed for the churches and the ways in which these problems have been or might be met. Aside from three classic readings on the sociology of the city by Wirth, Simmel, and Park and a few empirical reports by contemporary sociologists, all the selections are by churchmen writing from a specifically religious perspective. Most of these selections manifest a concern with developing an effective Christian witness and sense of community within the urban environment, and especially within the "inner-city" areas where old-line Protestantism has never been very successful. This is a well-selected group of essays that is likely to appeal more to Protestant clergy and seminarians than to academic sociologists.

BENTON JOHNSON
University of Oregon

The Sociology of Education: A Sourcebook. Edited by ROBERT R. BELL. Dorsey Series in Anthropology and Sociology. Homewood, Ill.: Dorsey Press, 1962. viii, 368 pp. $6.50.

This is a compilation of twenty-six papers organized in five parts. The editor provides an organizing framework for each part in an introductory statement. The five titles give some indication of the content: *Social Change and Education; Non-formal Learning Situations; Social Class; The School as a Social System;* and *The Teacher.* All but a few of the articles are by sociologists and all contribute to a sociological analysis of the educational institutions.

The editor chose to include a relatively small number of complete selections rather than portions of a larger number. This limits the range of selections and may reduce its usefulness to some potential users. Sociologists who have followed the sociology of education literature will be acquainted with nearly all the selections. Others who are looking for a sourcebook in the field will find significant sociology of education material in this volume. The editor made no attempt to provide either a complete survey of the field or selections bearing on all phases of the literature. Rather, the choice of articles is based on his "own reading knowledge and experience in teaching a course in the sociology of education."

Some may use this volume as a text, but the limited scope and inadequate coverage of many areas would necessitate extensive supplementation. It will be useful as a supplement to texts in the field, but some will not find significant contributions they would have selected.

WILBUR BROOKOVER
Michigan State University

Readings in Sociology: Sources and Comment. Edited by JOHN F. CUBER and PEGGY B. HARROFF. New York: Appleton-Century-Crofts, 1962. xiii, 337 pp. $1.95, paper.

The reason given by the authors for adding this book of readings to the growing list of such publications is the need for a "book of readings which would supplement any of the currently used textbooks and still hold total cost to a reasonable level." These goals are met reasonably well. The book, in addition to being relatively inexpensive and conveniently compact, does contain a large number of readings, forty-eight in all. The selections, themselves, vary widely in content; there is something for everyone. What emphasis is found in these selections would be on the kind of insights and challenging ideas which might appeal mainly to those who, along with Robert

cated classes in the half-century preceding the advent of Nazism was the way they allowed themselves to be seduced by the vacuous prophets of a spurious *Deutschtum*. Even refined, cosmopolitan minds like that of the early Thomas Mann succumbed to their blandishments. What Lagarde and Langbehn and Moeller sowed, Hitler finally harvested. What had started as innocent mystifications ended in political terror. It is in tracing this connection that Mr. Stern is at his best, and it is here that his book will have its widest appeal. He does not hold the Germanic ideologists responsible for Nazism—he is too discriminating for that. Rather, he demonstrates convincingly that Hitler picked from them only what fitted his own purposes and eventually repudiated the author of *The Third Reich* entirely. But in the final question Mr. Stern leaves with his readers the verdict is unmistakable: "Can one abjure reason, glorify force, prophesy the age of the imperial dictator, . . . without preparing the triumph of irresponsibility?" (p. 298).

H. STUART HUGHES

HARVARD UNIVERSITY

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton, Princeton University Press, 1961.—xiv, 452 pp. $8.50.

The literature of the law has frequently dealt with the use of the judicial process in the struggle to maintain or achieve political power. But it has been largely concerned with a description of events or a technical analysis of the legal doctrines involved. There has been little or no effort to give a theoretical cast to this mass of raw material. We have had no comprehensive analysis of the role of the judicial institution when employed directly "to bolster or create new power positions." Dr. Kirchheimer's book, which essays this task, is a notable contribution.

It makes, in fact, several contributions. On a more abstract level, it is a masterly analysis of the operation of the judicial process when used for political purposes—the ends it serves, the circumstances under which it is invoked, the manner in which it reflects and responds to political pressures. Dr. Kirchheimer classifies the political trial according to three main categories: the trial of a common crime committed for political purposes, in which the proceeding is conducted with a view to the political benefits accruing from a successful prosecution; the "classic political trial," in which the government attempts to apply legal sanctions to the political activity of its foes; and the "derivative trial," where the issue is framed in the form of a suit for defamation or a prosecution for perjury or contempt. He gives specific

Political Science Q

examples of each type of proceeding and appraises the techniques and results under varying kinds of political structure. The functions of the political trial from the government's viewpoint are analyzed and the efforts of modern regimes to use the judicial process, not only for legitimizing the application of sanctions against a political enemy, but for manipulating public opinion and rallying mass support for the regime, are discussed. Similarly, the risks to the government and the opportunity for the defense to use the judicial process for its own ends are considered. In two of his best chapters Dr. Kirchheimer deals with the roles of the various participants in the political trial. Here he treats with great insight the function of the judge, the jury, the police, the prosecutor, the defendant, the defendant's lawyer and the witnesses, and shows how they play their respective parts. The analysis is instructive and provocative throughout.

Political Justice makes an equally important contribution on a somewhat different level. It is an excellent treatise on the maintenance of political liberty in a modern mass society through methods of constitutionalism. One chapter is devoted to a historical survey of the area of protection allowed by various regimes at different times to political opposition. Another, also one of the best, deals with legal repression of hostile political organizations, including the basic problem of the treatment of antidemocratic groups in a democratic society. There is an insightful discussion of the function of an independent judiciary in a constitutional order, and an intriguing chapter on the contrasting role of a party-directed judiciary in a totalitarian state as exemplified by the judicial institutions of East Germany. At various points throughout the book Dr. Kirchheimer throws light on a much neglected aspect of the judicial process in a constitutional state—the dynamics of political repression. There are perceptive discussions of the use of informers; the significance of insisting upon naming collaborators in political trials; the function of the security police; the treatment of defectors—including American insistence upon repentance; and public attitudes toward political deviants. Very little is available today that illuminates more sharply the problems of a modern democratic society seeking order, liberty and change under a rule of law.

Added to this, or related to it, the book contains informative chapters upon the trial of ousted leaders by a successor regime, dealing principally with the Nuremberg trials, on the practice of political asylum, and on the granting of clemency in political cases.

Dr. Kirchheimer's approach is a wide-ranging one. He considers political justice in many different periods of history, under a great variety of regimes, as illustrated by numerous cases. His

scholarship is impressive. So are his political and psychological insights, and the depth of his understanding. He writes with cosmic objectivity but with a feeling for the human beings involved—both the judges and the judged (to whom his book is dedicated). Unfortunately, the style is obscure at times, at least for this reviewer, but as one proceeds it gains in clarity and eloquence. There is certainly room for disagreement with some of Dr. Kirchheimer's interpretations and with the treatment of some details. But his study is always enlightening and stimulating—all in all a brilliant performance.

THOMAS I. EMERSON

YALE LAW SCHOOL

Who Governs? Democracy and Power in an American City. By ROBERT A. DAHL. New Haven, Yale University Press, 1961. —xii, 355 pp. $7.50.

What John Locke did to Filmer, Professor Dahl has done for Floyd Hunter. Or has he? Anyone seriously concerned with current systematic political theory or with urban politics should read *Who Governs?* and answer this question for himself. Residents of New Haven, the city which serves as Dahl's convenient test case, and followers of the burgeoning literature of "community power" have doubtlessly already done so.

Until recently local government and politics were receiving relatively little serious academic attention. From 1933 on, other matters seemed more pressing. But in 1953, Floyd Hunter's controversial *Community Power Structure,* based on his analysis of Atlanta, made a very large splash in the academic "backwater" of local politics. By the end of the decade everyone from the Ford Foundation to John Kenneth Galbraith was hailing the importance of local government, the urgency of "metropolitan problems," and the difficulty of determining who—if anyone—governs our cities.

Hunter may well be the most influential social worker since Harry Hopkins. His book provided both a simple (even simplistic) methodology—"reputational analysis" to identify "community influentials"—and a provocative thesis: local politics is largely controlled, directly or indirectly, by the dominant economic interests. Many sociologists hailed Hunter's method and accepted his findings, but most political scientists were dubious. In a series of brilliant articles Dahl launched a powerful critique of both Hunter's method and his conclusions, and provided some exciting glimpses of his own study of New Haven.

Who Governs? is no mere collection of Dahl's previous papers, but a major new work. The empirical study of New Haven is

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- Sports: Hail or Farewell? — by RED SMITH

Tipping the Scales

POLITICAL JUSTICE: The Use of Legal Procedure for Political Ends. By Otto Kirchheimer. 452 pp. Princeton, N. J.: Princeton University Press. $8.50.

By EDMOND CAHN

AS the Eichmann story moves to its close, this general study of political prosecutions is particularly timely. All the ineluctable questions press forward in it. When, for example, does history justify a Government's employing the judicial process for purposes like the Stalin purges of the Nineteen Thirties, the Nuremberg war-guilt trials, or the American Smith-Act cases? What may be gained in the process, what lost? Does experience indicate better ways to deal with political offenders and adversaries? In this scholarly work, history digs deep into its grab-bag, gropes from corner to corner, and pulls out—not one but a dozen diverse answers.

Tales of state trials are naturally dramatic, and no one could have paraded them with greater erudition or industry than Otto Kirchheimer, Professor of Political Science at Columbia, has here. Whenever he recounts a particular case—the Goebel assassination in Kentucky (1900), the Caillaux murder trial in France (1920), the recent Stepinac and Hiss cases, or the strange Swiss prosecution of Prof. André Bonnard for transmitting political intelligence (1954)—he never fails to absorb the reader. Profiting from a European educational background, he not only includes several prosecutions that are unfamiliar to Americans, he also portrays familiar prosecutions in an unfamiliar perspective.

Throughout, Mr. Kirchheimer's attitude toward the repressions, political injustices and personal tragedies he is narrating remains cool, distant, disengaged. Others may take sides and grow indignant; he merely watches and describes, the perfect neutral. Yet just once he forgets his reserve long enough to condemn (quite rightly) President Eisenhower's implied offer to spare the lives of Julius and Ethel Rosenberg if they would confess their guilt. "Using the expectation of clemency as lure for a post-conviction confession that would shore up a problematic judgment, contradicts the very essence of both clemency and justice."

I wish the author had lapsed this way more often, for his incidental remarks about politics, courts and lawyers are always incisive. Of course, objectivity is an indispensable virtue when the material under analysis can be subdued to a scientific processing. But this material plainly could not.

In scientific terms, what can one hope to demonstrate by narrating and classifying a variety of politically motivated trials held in a variety of times, places, cultures and legal orders? Even if the instances you collect happen by some miracle to point in the same direction, you still have no means of proving that there are no other cases that point just the opposite way.

A single example will illustrate the danger: I did not find even a passing reference to the trial of Aaron Burr, probably the most celebrated political prosecution in American history, which brought President Jefferson into open collision with Chief Justice Marshall, put a former Vice President (and very-near President) in the prisoner's dock on a treason charge, and engendered principles of law that bulwark our civil liberties to this day. Caring nothing for scientific studies or systems, Burr won an acquittal.

THEN again, what is the criterion by which to distinguish "political" cases from the others? How should one classify, say, the trial of Queen Caroline of England when George IV accused her of adultery? Was the income-tax prosecution of Al Capone "political" or not? Some would say that since general laws and specific prosecutions are only ways of implementing the dominant forces and values of the society, all are in essence political. Among the many other things law is, it is certainly a proliferation of high politics. The choosing of one case rather than another as "political" must always be a matter of personal judgment, always debatable.

In his final chapters, after a valuable study of executive clemency, political asylum and amnesty, Mr. Kirchheimer takes a farewell glance at the unhappy judge who is required to conduct, and the wretched accused who is required to undergo, a political trial. He looks at them and still feels cool. He reflects that in the course of time Clio, muse of history, may show that both of them were fools, and he suggests we pray for them. I think we must do more.

Mr. Cahn, Professor of Law at New York University, is author of "The Predicament of Democratic Man."

Resort to the Courts

PUBLIC authorities today have made a conscious effort to use the trial form for purposes of internal mobilization. From the closing days of World War I to Ben-Gurion's desire to use the full account of the extermination of the Jews, uniquely provided in an Eichmann trial, as the focal point for Israel's self-assertion before continuing threats to its existence, there has been a never-ending effort to enlarge the effectiveness of political action by resort to the courts.—*"Political Justice."*

[New York Times 1/16/62]

How Politics Can Tilt The Scales of Justice

William O. Douglas

Associate Justice Douglas of the United States Supreme Court is the author of several books on aspects of democracy, including the recent "A Living Bill of Rights."

POLITICAL JUSTICE. By Otto Kirchheimer. Princeton. 452 pp. $8.50.

PROF. KIRCHHEIMER of Columbia has written an absorbing account of the use of political power throughout Western, Russian and South African history to crush, penalize, frustrate, discredit or liquidate the opposition.

The opposition may be a minority or, in South Africa, a majority. The device may be a bill of attainder (curiously not discussed in the book in spite of United States v. Lovett, 328 U. S. 303), government decrees, laws of outlawry and banishment, a series of legislative enactments that constitute harassment, a specially constituted court (a la Stalin) to try an opponent, or a trial. Or judicial action may be fenced off so as to be ineffective or powerless.

The trials may be for murder, espionage, conspiracy, treason, sedition, libel or what not. Examples of each are given, starting with the Powers trial in Kentucky last century, a collateral aspect is seen in Taylor v. Beckham, 178 U. S. 548.

The trials described are not American or British only. French, German, Italian, Israeli and Russian precedents are also used. And the most conspicuous on the American scene are the various trials that directly—like the Dennis case (341 U. S. 494)—or indirectly—like the Alger Hiss case—implicate the Communist Party.

TRIALS such as the Nuremberg trial (trial by fiat, the author calls them) are also discussed. One chapter is devoted to the means used to ties through the use of various legal devices, an account that covers a wide range both in Europe and in this country. Other chapters concern themselves with Asylum and Pardons.

But the bulk of the book discusses lawyers, prosecutors, judges and juries and their performances in trials that have political overtones or political objectives.

The overall picture is one of officialdom, as well as juries, marching to the tune that public opinion or the mood of the day calls. Chapter and verse are cited in some detail—both in prosecutions under Communist regimes and in prosecutions in the so-called democratic nations.

One gets an impression of judges, consciously or otherwise, taking Gallup Polls on public opinion and hurrying unpopular people to prison or electric chairs. One gets an impression that in no land—either Communist or democratic—are judges independent and able to do justice in political or politically-tinged cases.

THE CONCLUSION, I think, is dependent in part on the materials selected. The ones analyzed by this unusually gifted author make his theory plausible. At least they show extremes of monstrous decisions on one hand and arguably prejudiced decisions on the other.

Yet the condemnation of judges cannot be substantiated, I think, by the portrayal of a few judges who have played to the galleries. It is true that the Russians in a sense face the problem directly by creating special courts whose duty it is to convict before the sun sets, while we implicate the regular tribunals.

But the record of Americable—judged by due process standards—than I think the book makes out. There is a long list of unpopular people whose convictions have been set aside in America because they were not accorded due process. Moreover, the issues in cases like Dennis are not understood by lining up judges as pro-free society on one hand and anti-Communist on the other or as very anti-Communist on the one hand and only-a-little anti-Communist on the other.

Most judges on the scene in the last 20 years, including the late Learned Hand, were passionately pro-free society and would never debase themselves by convicting a man because the press or galleries or the powers-that-be wanted or demanded it. The difference between majority and minority was more subtle; and the difference was not born out of political trials.

One school, of which Learned Hand was a spokesman, thinks that the command that "Congress shall make no law abridging freedom of speech" is merely a "counsel of moderation" which means the First Amendment should be read: "Congress may make some laws abridging freedom of speech."

Others read the First Amendment more literally, maintaining that it means what it says. This is a difference forged long before the Communist trials appeared.

So the entire library of American cases does not fit as neatly into the theme of the book as the author makes out. Yet the survey brings to light much European material, particularly German, that will inform and fascinate students for years on end.

The relationship between politics and justice examined in the book reviewed at left traditionally has been the concern not only of jurists and political scientists but of artists as well. One such graphic commentary, reproduced above, is Ben Shahn's painting "The Passion of Sacco and Vanzetti." It appears as an illustration of the social school of modern painting in AMERICAN ART OF OUR CENTURY by Lloyd Goodrich and John I. H. Baur, director and associate director of New York's Whitney Museum (Praeger, $15). The book combines a discerning discussion of the many aspects of the national genius with 81 illustrative color plates and 166 black and white reproductions.

Washington Post
Sunday, Dec 2, 1961

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton, Princeton University Press, 1961.—xiv, 452 pp. $8.50.

The literature of the law has frequently dealt with the use of the judicial process in the struggle to maintain or achieve political power. But it has been largely concerned with a description of events or a technical analysis of the legal doctrines involved. There has been little or no effort to give a theoretical cast to this mass of raw material. We have had no comprehensive analysis of the role of the judicial institution when employed directly "to bolster or create new power positions." Dr. Kirchheimer's book, which essays this task, is a notable contribution.

It makes, in fact, several contributions. On a more abstract level, it is a masterly analysis of the operation of the judicial process when used for political purposes—the ends it serves, the circumstances under which it is invoked, the manner in which it reflects and responds to political pressures. Dr. Kirchheimer classifies the political trial according to three main categories: the trial of a common crime committed for political purposes, in which the proceeding is conducted with a view to the political benefits accruing from a successful prosecution; the "classic political trial," in which the government attempts to apply legal sanctions to the political activity of its foes; and the "derivative trial," where the issue is framed in the form of a suit for defamation or a prosecution for perjury or contempt. He gives specific examples of each type of proceeding and appraises the techniques and results under varying kinds of political structure. The functions of the political trial from the government's viewpoint are analyzed and the efforts of modern regimes to use the judicial process, not only for legitimizing the application of sanctions against a political enemy, but for manipulating public opinion and rallying mass support for the regime, are discussed. Similarly, the risks to the government and the opportunity for the defense to use the judicial process for its own ends are considered. In two of his best chapters Dr. Kirchheimer deals with the roles of the various participants in the political trial. Here he treats with great insight the function of the judge, the jury, the police, the prosecutor, the defendant, the defendant's lawyer and the witnesses, and shows how they play their respective parts. The analysis is instructive and provocative throughout.

Political Justice makes an equally important contribution on a somewhat different level. It is an excellent treatise on the maintenance of political liberty in a modern mass society through methods of constitutionalism. One chapter is devoted to a historical survey of the area of protection allowed by various regimes at different times to political opposition. Another, also one of the best, deals with legal repression of hostile political organizations, including the basic problem of the treatment of anti-democratic groups in a democratic society. There is an insightful discussion of the function of an independent judiciary in a constitutional order, and an intriguing chapter on the contrasting role of a party-directed judiciary in a totalitarian state as exemplified by the judicial institutions of East Germany. At various points throughout the book Dr. Kirchheimer throws light on a much neglected aspect of the judicial process in a constitutional state—the dynamics of political repression. There are perceptive discussions of the use of informers; the significance of insisting upon naming collaborators in political trials; the function of the security police; the treatment of defectors—including American insistence upon repentance; and public attitudes toward political deviants. Very little is available today that illuminates more sharply the problems of a modern democratic society seeking order, liberty and change under a rule of law.

Added to this, or related to it, the book contains informative chapters upon the trial of ousted leaders by a successor regime, dealing principally with the Nuremberg trials, on the practice of political asylum, and on the granting of clemency in political cases.

Dr. Kirchheimer's approach is a wide-ranging one. He considers political justice in many different periods of history, under a great variety of regimes, as illustrated by numerous cases. His scholarship is impressive. So are his political and psychological insights, and the depth of his understanding. He writes with cosmic objectivity but with a feeling for the human beings involved—both the judges and the judged (to whom his book is dedicated). Unfortunately, the style is obsure at times, at least for this reviewer, but as one proceeds it gains in clarity and eloquence. There is certainly room for disagreement with some of Dr. Kirchheimer's interpretations and with the treatment of some details. But his study is always enlightening and stimulating—all in all a brilliant performance.

THOMAS I. EMERSON

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been stranded on cloud nine; here is a strongly supported plea for a new ethic, devoid of suggestive workable recourses. In the event of a "new ethic," the ugly concept of war coupled with future "irreversible decisions" threatens to eliminate *any* ethic. A successful "new ethic" is highly questionable as poignantly illustrated by the remarks of Secretary Stimson recalling his five years as Secretary of War:

> . . . I see too many stern and heart-rendering decisions to be willing to pretend that war is anything else than what it is. The face of war is the face of death; death is an inevitable part of every order that a wartime leader gives. The decision to use the atomic bomb was a decision that brought death to over a hundred thousand Japanese. No explanation can change that fact and I do not wish to gloss it over. But this deliberate, premeditated destruction was our least abhorrent choice. The destruction of Hiroshima and Nagasaki put an end to the Japanese war. It stopped the fire raids, and the strangling blockade; it ended the ghastly specter of a clash of great land armies.

The Irreversible Decision is extremely well documented. The credibility of Mr. Batchelder's reasoning is superb and enables one to visualize the need for his "new ethic." He consistently illustrates its functioning in limited warfare and the cold war, but not in the face of total war.

H.D.R.

Political Justice. OTTO KIRCHHEIMER. Princeton: PRINCETON UNIVERSITY PRESS, 1961. 436 pp. $8.50.

RATHER than presenting an ideal order or perfected body politic, *Political Justice* deals with a many-sided problem concerning the use of judicial institutions and devices for political purposes. Its scope suggests an inherent difficulty in presentation if theoretical analysis and documentation are not to be sacrificed for the continuity and story-telling which is so often preferred by the general reader. Utilizing a mass of domestic and foreign source material, Dr. Kirchheimer, professor of Political Science at Columbia University, has chosen the social scientist's idiom and approach, while not losing all the potentialities for a broader, popular appeal.

As a first step toward continuity, the author has organized his study into three distinct sections. In the first part, he deals with the historical and conceptual framework of political justice, configurations of political trials, and legal repression of political organizations. Then in the second part, the author introduces the dramatis personae, especially the defendant, his lawyer and the judge. Here, also, he develops the political integration of the judiciary, and concludes with a discussion of a subspecies of political justice—trial by fiat of a successor regime. Finally, part three concerns the devices of asylum and clemency as frustrating the action patterns previously analyzed.

Within this scheme of organization, some major themes of inquiry cut through the various chapter divisions. Perhaps most important is the question of separation—that is:

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

The author concludes that effectiveness of submitting political conflicts to the courts cannot be measured satisfactorily within the record of historical process. He, therefore, avoids a collection of causes célèbres, and instead analyzes this device in terms of what the various parties might expect by turning to the courts. He inquires into the degree of justification for styling them courts as such, as well as under what terms these conflicts are submitted, sidetracked, or terminated. All of this inquiry is based on the premise that, in essence, a political trial is aimed at affecting power relations, either by undermining existing power positions or by strengthening efforts directed at their preservation.

Interlaced within the analytical material are some historical examples which provide pleasant interludes from the heavily documented approach of the political scientist. These illustrations are skillfully chosen and thoroughly appropriate; so much so that a major criticism of some later chapters is their absence and the resulting overemphasis on theoretical dialectics. One of the best uses of this device is Dr. Kirchheimer's exposition of the *Caillaux* case in First-World-War France as an example of court action which may act as validation or invalidation of an ar-

The Irreversible Decision, reveals extraordinary depth in his analysis of events that shaped the decision to use the atomic bomb and undertakes a cogent examination of the resulting ethical confusion as he pleads for a new ethic to guide the political and military decisions of the nuclear age.

The author strikes a remarkable balance throughout his work between the concept of the Christian ethic guiding man's morality and the military objective fulfilled in World War II by the atomic bomb and now available in greater magnitude for a possible World War III. Mr. Batchelder, who holds a B.D. from Yale Divinity School and has recently obtained a Ph.D. from Yale in the field of Christian social ethics, effectively imposes self-restraint as he masterfully constructs this technical equilibrium.

Mr. Batchelder, in penetrating the historic and contemporary events of the "decision," the drama of the decision itself, the impact and long term effects upon the minds and emotions of mankind, and the added ethical problem posed by the creation of atomic weapons, disposes of the dilemma of characterizing the vast number of personages involved in a most technically economical manner; he places individuals in their respective compartments—scientists, statesmen, militarists, philosophers—thereby concentrating characterization on a class basis. Nonetheless, the author manages to convey to the reader a personal impact from each class. In the years 1939-41, when the scientists' efforts to spur the government to take direct action in development seemed to be in vain, such men as Einstein, Fermi and Szilard felt as if they "were swimming in syrup." Commenting on the wartime use of nuclear energy after having urged so stringently the government to adopt its use, Einstein described the aftermath of paradoxical frustration he and his contemporaries experienced: "If I had known that the Germans would not succeed in constructing the atomic bomb, I would never had lifted a finger." Vibrantly, the author contrasts the positions taken by such military strategists as LeMay, MacArthur, the Chiefs of Staff and the President's personal advisors — positions which confronted the new President in making his decision. The author, conveying a profile of President Truman to the reader, extracts emotional words that the new President used in reporting to the nation on his return from the Potsdam Conference in August of 1945:

> Having found the bomb we have used it. We have used it against those who have attacked us without warning at Pearl Harbor, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying international laws of warfare. We have used it in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Americans.
>
> We shall continue to use it until we completely destroy Japan's power to make war. Only a Japanese surrender will stop us.

By applying their respective ethics to the use and consequences of the atomic bomb, the writer competently contrasts the varying positions taken by Protestants, Catholics, Pacificists and Non-Pacifists groups following the "irreversible decision." The author eruditely criticizes their fallible positions in light of the traditional Christian ethic. Robert Batchelder's reflections are not limited to these ethical premises of post-war years (1946-1950). He sacrifices ethical concepts for the pragmatic problems involved as he effectively chides the United States' inept diplomatic and political foresight and concludes that ". . . the decision to use the bomb might well have been rendered unnecessary . . ." if an attempt to end the war by political and diplomatic means had been undertaken sooner. Although deeply concerned with the ethical considerations involved in the decisions to make and use the bomb, the author criticizes the inconsistencies in the post-war debates over the use of atomic weapons. Yet primarily he demonstrates the lack of wisdom in letting fears dictate policy in the fateful years of 1939-45.

Author Batchelder echoes the "voice in the wilderness" of the cold war as he pleas for a new ethic to guide the political and military decisions of the nuclear age. He tacitly asserts that " . . . what is required is not only a new *understanding* of moral principles in each new historical context, but also a new understanding of *moral principles* in each new context." He suggests that a firmer grasp upon such future basic principles coupled with a stronger hold upon the "just cause" in warfare might avert future atomic conflicts and mitigate the loss of human lives. Yet, the reader feels as if he has

rest, the political effect of which was calculated for and had been spent at a much earlier period.

Turning back to the theoretical analysis, Dr. Kirchheimer in Part Two, discusses major problem areas of the political trial and the nature and quality of political jurisdiction. He examines the relation of the judge to the regime under which he serves and the problems of differentiating between political and criminal responsibilty. Finally, he makes an interesting distinction between a political defendant and a defendant who by mischance becomes involved in a political trial. Using the *Powers* case as an example, the author states that whatever the immediate consequences of the court's disposition of his case, the political defendant would have disassociated himself, in his final plea at the latest, from a defense lawyer who nominally served his client while working toward the propaganda interest of the authorities. Powers is presented in the defendant-by-mischance role because he deferred such a step until it would no longer affect the outcome of his trial, but only his eventual reception in the United States.

Later on in Part Two, after an extensive discussion of Communist and non-Communist legal structures, Dr. Kirchheimer concludes that under the former political system, legality becomes a technique of domination. The Communist party alone decides whether law or another instrument of social control should be given precedence. Under this view, law serves the ruling group as a tool for modifying or shaping te development of society, and revolutionary legality stands for planned, coordinated and disciplinal exercise of class rule.

This is not to say, however, that each society does not have areas where the rule of law is uncertain, or even nonexistent. These areas may be distinguished as identifiable geographic areas, or they may be nothing more than predispositions of certain groups ready to act if the socio-political configuration changes and restraining influences appear weak. Perhaps the decisive difference, as presented in this analysis, between a normal and criminal state, involves the degree to which such areas are kept under control and whether they are encroaching on wider fields of social activities.

Another interesting area of concentration within Part Two, is the discussion of the Nuremberg Trials. Viewed as a trial by fiat, conducted under a successor regime which was also the victorious military power, the trials are criticized from several perspectives. Even though the author suggests some advantages of a local German court and trial, he concludes that no greater objectivity would have been provided:

> . . . the claim that the juridical liquidation of the Nationalist Socialist heritage by the foreign "victors-successors" was less dispassionate than corresponding proceedings before indigenous German jurisdictions would have been in 1946 and 1947 is, to put it mildly, hard to believe.

Finally, the Nuremberg discussion is concluded with one of the more traditional criticisms—that of the inequality between prosecution and defense. Unfortunately, lack of resources of the defense counsel and the establishment, after indictment, of procedural rules in conformity with Anglo-American rather than continental practices, are not persuasively argued as indices of such a disadvantage. As a result, the later theoretical observations are less comfortably accepted by the reader who is unable to separate substantively inappropriate examples from their supposedly derivative conclusions.

Dr. Kirchheimer, however, certainly has presented the problematic character of political justice. His third and final section appropriately is concerned with the intensive interest which develops in the institutionalized ways of escaping or mitigating its impact. Both asylum and clemency are presented as institutionalized devices for countermanding the course of political justice. This section, even more than those preceding it, draws on historical and literary source material which is particularly interesting in a "survey" frame of reference. Although an impressive college of background anecdotes, these references, however, tend to clutter and obscure analytical development. Perhaps such a disability is less decisive in view of the obvious difficulties of fitting the study of asylum and clemency into the more rigorous disciplines of a study oriented toward the social sciences.

After such a thoroughgoing examination of political justice, the author, not unexpectedly, refrains from presenting any systematic answers to the various, interrelated problems raised in the analysis. He does say that political justice as a concept, is beneficial in that the fight for

political power, although continuing relentlessly, would be less orderly without the intercession of judicial apparatus. Whether such a position explains Dr. Kirchheimer's concern over separateness of the judiciary, and thus integrates some of the disparate threads of anaylsis, cannot be determined from his own statements. This implication does help the reader to interrelate various focal points of the author's impressive scholarship, and offers a guide for rereading topic areas of special interest. Perhaps not light reading as political history or even the usual kind of jurisprudential exploration, *Political Justice* diffuses none of its social-science dissections in offering the reader a kind of contemporary, legal documentary with a concomitantly broader, popular appeal.

W.L.E., Jr.

Why Not Victory? BARRY M. GOLDWATER. New York: MCGRAW-HILL BOOK CO. 1962. 188 pp. $3.95.

IN the opening remarks of his newest literary effort, *Why Not Victory?*, Senator Barry Goldwater concedes that there might not be a need for this book. Though his statement is hyperbolic, the temptation is to concur with the Senator's suggestion.

Unfortunately, the book betrays a crudity of style which would hamper anyone whose primary goal is not to entertain but to get across certain essential ideas. As the Senator admits in the introduction the book was largely ghost written, and by a variety of people. The result is stylistic and tonal chaos. One might reasonably expect this when the ideas of one person are written in the language of several others and the separate parts are collected to form a "book."

The book is a self-styled critique of American foreign policy since World War II. However, even though the main emphasis is on events occuring since 1945, the Senator does not hesitate to summon history to buttress his mental earthworks. The work is divided into thirteen chapters in which the Senator attempts to explain why or how America has failed in certain areas of crucial policy making and execution. Among the topics he deals with are: the U-2 incident, American failures in Cuba, the Monroe Doctrine, the World Court, disarmament, the United Nations, Red China, and the war of the future. As the number of topics might indicate, coverage could hardly be more than superficial in the space of this brief work.

Senator Goldwater's basic thesis is that American foreign policy, at the outset, is based on the proposition that there can be no victory over Communism, and that from this proposition flow all of the United States' inabilities to cope adequately with the Communist bloc's designs for world conquest. Since, as he sees it, the opposite of victory is defeat (and logically, since we have disavowed victory as our goal, we must be pursuing defeat), we have only to abandon defeat, swear allegiance to victory and it will be ours. The syllogism fails. For the substance of the "mental earthworks" contained in this work is more akin to sand than rock.

The Senator suffers from a basic lack of knowledge of history compounded by an acute case of frustration at the elusiveness of absolute power for the United States over the world. Consider the following paragraph in which the author offers some thoughts on the paradox which Cuba presents to the United States:

> Of course, in those days we could take unilateral action. We could pursue boldly any course dictated by our national conscience without concern over what such action might do to our prestige in an organization such as the United Nations. Nor were we restricted by oversensitiveness to the reaction of other powers to actions we might take. We certainly weren't the most powerful nation on earth at the turn of the century. Nor were we the richest or most influential. But we were, in our convictions and on our willingness to back them, among the most independent of nations then flourishing. It was this independence—strong, virile, and unafraid—that led us to challenge a much mightier Spain and call her to account for her tyranny over our Western Hemispheric neighbors. It was this independence that led the other nations of the world to treat our fledgling country with the respect due her convictions and determination.

At the risk of boring the reader with such a long quotation, the reviewer feels it is fair and best to let the Senator speak for himself. The key word in the quotation—that which best expresses the substantive tone of the Senator's nostalgia—is *determination*. This thought runs throughout the book: that in situation after situation America has lost her determination to follow her convic-

Political Justice. The Use of Legal Procedure for Political Ends (La justice politique. L'emploi des procédés judiciaires à des fins politiques), par Otto Kirchheimer, Princeton, New Jersey, Princeton University Press, 1961, 452 pages.

p. 459

C'est avec une réelle maîtrise que M. Kirchheimer aborde le problème aussi ample que dramatique, et toujours actuel, de l'emploi par la machine étatique au pouvoir des procédés judiciaires à des fins politiques. Professeur de sciences politiques à la *Columbia University*, M. Kirchheimer apporte ici une contribution très substantielle qui enrichira assurément la littérature sur la question. On ne saurait assez insister sur la haute qualité de son étonnante érudition, liée à un esprit juridique de premier ordre et à une richesse d'informations présentées avec une louable objectivité, nuancée, il est vrai, d'un soupçon de cynisme. Il paraît presque impossible de procéder, dans le cadre limité d'un compte rendu, à une analyse détaillée d'un ouvrage de cette envergure, dont la lecture offre une véritable mine d'informations et de réflexions. Nous nous bornerons donc à faire ressortir quelques-unes des thèses principales de l'auteur.

A juste titre, M. Kirchheimer choisit comme point de départ la triste vérité, maintes fois mise en lumière par l'histoire mondiale, à savoir que tout système politique a ses adversaires ou qu'il les crée dans le cours du temps. Une des mesures fréquemment prises pour les combattre est le recours aux organes de l'administration de la justice. D'après M. Kirchheimer, les procès politiques prennent les trois formes-types suivantes : 1° celle où un délit de droit commun fut commis dans un but politique et où un procès mené d'une manière efficace peut apporter des avantages politiques ; 2° celle du procès politique dit classique. où un régime donné cherche à incriminer son adversaire, mettant en cause l'activité publique de celui-ci afin de l'éliminer de la scène politique ; 3° celle d'un procès politique « oblique » où la manipulation habile d'armes telles que diffamation ou parjure peut jeter le discrédit sur l'ennemi politique.

C'est à l'analyse minutieuse du cadre historique, méthodique et conceptuel de ces trois formes de procès politiques, qu'est consacrée la première partie de l'ouvrage, largement illustrée de cas réels. On ne peut qu'admirer la finesse avec laquelle l'auteur y fait ressortir, entre autres, le problème juridique toujours délicat de la délimitation entre le délit de haute trahison et de la simple opposition à la politique gouvernementale.

La deuxième partie attirera encore davantage l'attention du juriste, car l'auteur y

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analyse en détail les *dramatis personae* du procès politique, et en particulier le juge, l'accusé et son défenseur. Plusieurs pages de ce chapitre transplantent le lecteur dans l'Antiquité, car le professeur Kirchheimer n'omet pas d'enrichir de ses réflexions les données sur le déroulement du procès de Socrate, et de celui de Jésus.

Mais c'est précisément ce chapitre qui risque de décevoir, voire de heurter le lecteur. C'est d'abord le fait de voir classé sous la dénomination de procès intenté par un « régime-successeur » le procès de Nuremberg, événement unique dans l'histoire du monde en réponse à l'événement unique que fut le crime des nazis. Ce terme aussi artificiellement subtil que cynique dans ce contexte, paraît pour le moins difficilement applicable au Tribunal militaire international de Nuremberg qui n'était pas composé — comme le veut M. Kirchheimer — des seuls quatre partenaires victorieux. C'est le monde civilisé tout entier, représenté par les spectres des victimes, qui jugeait les grands criminels nazis, et c'est en son nom, au nom de la conscience mondiale, que fut rendu le jugement de Nuremberg. Certes, on connaît les multiples critiques doctrinales, forcément stériles, du fondement de ce procès, portant sur la compétence du Tribunal ; la définition du crime contre l'humanité et de la guerre d'agression, ainsi que sur la rétroactivité des éléments constitutifs des délits définis ; sur l'application d'une procédure étrangère, la procédure pénale anglo-américaine au Continent ; sur le problème du devoir d'obéissance à l'ordre reçu, invoqué par la défense — et beaucoup d'autres.

On peut se demander pour quelle raison le professeur Kirchheimer se propose de revenir, une fois de plus, sur toutes ces mises en question nullement innocentes ? C'est un vrai choc d'autre part, que de voir l'auteur y ajouter le reproche du *Tu quoque*. Certes, les développements ultérieurs pourraient justifier ce reproche auquel — comme le souligne l'auteur — pourrait seul échapper l'archange, descendant sur terre au jour du jugement dernier. Il nous paraît préférable de garder en mémoire, avec respect et reconnaissance, le procès de Nuremberg et de le considérer comme un monument historique qui reste beau même si le temps y a fait ressortir quelques défauts. L'auteur admet d'ailleurs que ce procès fut « une opération moralement et historiquement nécessaire », tout en se demandant si un tribunal autochtone n'aurait pas été plus approprié pour juger les criminels nazis. Or, il faut espérer que le déroulement des procès récents en Allemagne, et surtout de celui des accusés du camp de concentration d'Auschwitz, a montré à M. Kirchheimer le contraire. Le procès de Nuremberg fut non seulement « une opération nécessaire », mais aussi le seul exemple d'un « procès politique » profondément juste, où « le grotesque et la monstruosité » de tout procès politique, justement évoqués par l'auteur pour d'autres exemples ne sauraient être applicables. En effet, comme le grotesque et la monstruosité consistent dans le fait, que le juge d'un procès politique est obligé d'affronter un accusé qui insiste sur la justesse de ses actes au nom d'une justice qu'il invoque, sur quelle « justice » pourraient se baser les criminels du procès de Nuremberg ? C'est cette définition même qui exclut ce procès historique de la catégorie des « procès politiques ».

La dernière partie de l'ouvrage apporte une très intéressante analyse de « la justice politique modifiée », à savoir des problèmes du droit d'asile et de la clémence.

Le livre de M. Kirchheimer est présenté de manière à faciliter sa lecture, malgré la richesse des détails, car trois index y sont inclus, dont un apportant une liste des cas jugés par les tribunaux américains et discutés par l'auteur, un deuxième qui contient une liste des noms, et un troisième qui est une table des matières détaillée.

A. FLATAU-SHUSTER

KIRCHHEIMER, O. *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton: Princeton University Press, 1961. Pp. xiv, 452.

The term political justice as used in this book adverts to the utilization of the devices of justice to bolster or create new power positions. Its aim is to enlist the judiciary in behalf of political goals. In the first of three parts, the cases, causes, and methods of political justice are treated, the nature of the changes in the structure of state protection in recent years as contrasted with earlier practices being

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initially defined. The political trial and the various types of legal repression of political organizations are then considered. Resort to the courts may be of necessity, choice, or mere convenience. The political trial may involve a common crime, the exploitation of which may be politically advantageous, or the subjection of an opponent to public incrimination or defamation, perjury and contempt. *Causes célèbres,* like those of Caleb Powers for the murder of Governor Goebel in 1900, Joseph Caillaux for treason against France in 1918, and Reich President Friedrich Ebert's defamation action in 1924, are used illustratively. The nonconstitutional trials of Andre Bonnard in Switzerland, Otto John and Heinrich Agartz in West Germany, and various defendants in Communist countries and Nazi Germany held after the second World War are described to demonstrate how the area of politically prohibitable activity has been enlarged. That the trial is a manipulable technique in the process of repressing hostile groups, even within the framework of democratic institutions, is affirmed in Part One's historical and analytical account of the forms of treatment applied by established regimes to opposition groups.

In Part Two, the organizational and societal framework for judicial action within a constitutional and one-party regime is described. Here there is much that will interest the student of comparative law, ranging from an account of judicial recruitment on the continent and in Anglo-American practice, through a consideration of varying approaches to the prosecution of political deviation. The judge gets the major portion of the attention; though an occasional participant in the community's vital policy actions, he checks, remodels, or forces changes through "interstitial" action, invokable only when sought after. In the heterogeneous society, the absence of commonly accepted starting propositions precludes impartiality; where there is homogeneity he may be a mere shuffler of legal technicalities. Such is suggested to have been the case in the trial of the American Communist Party in 1949, illustrative of the international nature of the twentieth century political trial, serving, as it does, as a focal point for political strategy throughout the world. Within the Soviet orbit, to which this proposition necessarily applies, the goal is maximal harmony between judicial activity and official policy, with every case "ideally" decided in the light of the contribution renderable to the momentary program's fulfillment. Here the content of legality shifts to permit enforcement of norms deemed within "points of concentration." Germany's National Socialist regime is distinguished as never having had as its goal any basic change in property relationships and social stratification; the law's continuity was insisted upon while its revolutionary features and innate lawlessness were conveniently overlooked. Trial by fiat of a successor regime, as exemplified by the Nuremberg war crimes trial, is considered finally in Part Two, with attention specifically directed to four of the defense's rejoinders and the general question of jurisdiction in cases of this nature.

Asylum and clemency, devices for the countermanding of the course of political justice and the frustration of its effects, are discussed and analyzed in Part Three, in the course of which practices and customs in different jurisdictions are compared. How the shifts in political constellations and usages affect the approaches of adjudicating and adjudicated, how they intermesh with time-honored practices and traditional principles, and how they relate to the irreducible remainder beyond rational determination are political issues to which attention is directed. In the Soviet Union, for example, traditional nineteenth

century notions of political asylum as a noble service to be granted to the politically persecuted clash strikingly with a practice that predicates refuge upon the individual's serviceability to the party machine. Some vestiges of hallowed tradition, that America is a haven to all comers, exist in the United States, although three decades of restrictive immigration policies have narrowed the scope of asylum chances. Great Britain most steadfastly upholds a liberal asylum tradition, while West Germany's Basic Law is permissive, but the list of countries neglectful of asylum principles is considerable. Necessarily, present day conditions involve governments in economic, public welfare, and administrative headaches, dealing as they must with huge masses of the politically persecuted, but, as is the case with the clemency device, where some subjectivity seems warranted in the light of humanity's present performance, political asylum appears vindicable in a deeply divided world, setting, as it does, some limit to any regime's power.

Professor Kirchheimer, by seeking to relate political content to juridical form and exposing it, performs, by this act alone, a notable service. Because justice in political matters is more tenuous than in any other field of jurisprudence, and because our international professions rarely coincide with our politico-national practices, his use of materials from many sources to evolve a less diffuse notion of what surrounds us warrants an accolade. He convincingly develops the theses that every political regime has its foes; that courts sit in readiness to settle conflict situations, and in so doing, eliminate political foes according to prearranged rules; and that beyond their power to authenticate official action, the courts have become a dimension through which many regimes can affirm their policies and integrate the population into their political goals. The sweep of his scholarship is immense; he ranges over Greek, Roman, European, and American referents; he historifies, he classifies, he analyzes, he compares. His toughmindedness shows through in many a well-turned phrase and jugular characterization. But his direction, more often than not, seems uncertain, and his value system, more frequently than less, seems vague. Political justice is on the one hand denigrated, and on the other, condoned. The "judicial space" within which it is found to be operative is not sufficiently defined to give to it a functioning personality. It is an "eternal detour, necessary and grotesque, beneficial and monstrous"; without political justice and the intercession of the judicial apparatus, the fight for political power "would be less orderly." It begins to fill all voids and in the process of being neutralized prompts evocation of the question whether it is not indeed consonant with justice. To this question an answer is wanting. One can understand why it is of importance for the Supreme Court of the United States to decide whether a question is justiciable or political; if the latter, the result, if one follows, is not of the Court's direct making. Why justice should be subdivided in the present endeavor requires clarification, which may well be the very next undertaking that the author embarks upon.

HILLIARD A. GARDINER

PALMER, N. D. *The Indian Political System.* Boston: Houghton Mifflin Co., 1961. Pp. x, 277.

India is undoubtedly the pivotal country in South Asia; where she goes politically and economically over the next decade will determine in large measure the fate of the rest of South Asia, and probably much of the rest of Asia as well. It is thus fitting that attention be directed to this addition

spécifique et une continuité certaine, particulièrement en ce qui concerne les deux grands principes de base du léninisme, à savoir la domination du Parti sur les masses, qui a comme but final la révolution mondiale, et la négation de la liberté individuelle telle qu'elle est comprise en Occident, avec son corollaire économique : la lutte continuelle du Parti contre l'entreprise privée et contre l'accumulation de la propriété privée.

Labedz et son équipe d'experts parlent trop brièvement de cette continuité et de cette logique spécifique du marxisme-léninisme officiel ; par contre ils nous entretiennent abondamment de l'autre aspect de la question, auquel nos observateurs des problèmes soviétiques accordent trop peu d'attention, à savoir les « girations » de la pensée marxiste, dont, nous affirme la prière d'insérer, Labedz est un éminent spécialiste. Ces « girations » sont bien entendu le signe du risque extrême que court le marxisme moderne antilénininiste, incapable, en dépit du brio intellectuel de ses promoteurs, de se dégager complètement des contradictions de la doctrine classique.

Après une lecture complète du *Révisionnisme* — que doit entreprendre tout étudiant sérieux du marxisme-léninisme — les restrictions imposées dans le passé aux philosophes soviétiques et maintenant aux philosophes des pays satellites, la série des chasses aux sorcières idéologiques, des purges et des auto-accusations philosophiques deviennent compréhensibles. Aussi compréhensible est la détermination des idéologues soviétiques de coller à Lénine, même si cela signifie en même temps l'abandon de Marx.

C. Olguine

OTTO KIRCHHEIMER : *POLITICAL JUSTICE*. The Use of Legal Procedure for Political Ends. Princeton University Press, Princeton, N. J., 1961, 452 pp.

Comme son titre l'indique, le livre d'Otto Kirchheimer, *Justice politique*, est, en même temps, une étude juridique et un traité politique consacrés aux particularités des crimes politiques et aux différentes façons de les combattre. Ce livre est profondément actuel, tant par son sujet que par son contenu. La vaste érudition de l'auteur lui a permis de conduire son investigation sur la base non seulement des événements des dix dernières années, mais encore de ceux d'un passé lointain. Le lecteur peut ainsi comparer et apprécier la pratique de ce passé lointain avec les moyens dont on use de nos jours pour lutter contre les crimes politiques, avec ou sans l'aide des tribunaux.

Citoyen allemand, l'auteur est particulièrement familiarisé avec la pratique de la justice politique en Allemagne, non seulement sous le règne du nazisme, mais aussi, après la guerre, en République Démocratique Allemande. Ne sachant pas le russe, il n'a inclus dans son travail très substantiel aucun chapitre concernant la justice politique soviétique, mais parle beaucoup de l'Etat totalitaire en général et de son système de répression des oppositions politiques. Cela le dispense d'un examen détaillé de la pratique judiciaire soviétique, d'ailleurs bien connue pour avoir été déjà abondamment décrite. Ce que nous apprenons ici de la pratique judiciaire en République Démocratique Allemande est parfaitement suffisant pour nous permettre de juger le système judiciaire de n'importe quel pays au pouvoir des communistes.

Comme le montre Kirchheimer à bon droit, c'est sous Staline, à plus d'un titre, que l'asservissement de la justice à la répression des oppositions politiques atteignit son point de perfection. Mais la Yougoslavie aussi a connu de semblables procès, et ceux de la République Démocratique Allemande sont des modèles en matière de préparation d'une affaire où la sentence est fixée d'avance.

Au surplus, l'auteur n'a pas voulu rédiger un traité dirigé spécialement contre les régimes communistes. Il cite maintes fois les excès imputables aux oppositions religieuses et raciales en Afrique du Sud, en Algérie, en Espagne, en Allemagne, etc. Il entend montrer combien il est néfaste, moralement et politiquement, de ruiner l'autorité de la justice, en transformant un procès judiciaire en spectacle politique, en privant le juge d'une libre appréciation des preuves, en limitant le choix des moyens de défense.

L'auteur montre en outre que le juge, dans les procès politiques, est moins le « gardien de la loi » qu'un représentant loyaliste du pouvoir. Plus étroitement il est lié au pouvoir, plus fidèlement il représente les vues du groupe ou du parti dirigeant, et plus la sentence est prédéterminée (p. 176). Là où le sort de la majorité de la poulation est réglé par une minorité insignifiante, il ne peut y avoir, entre le juge et des individus en réalité dépourvus de droits, de relations déterminées par le principe de l'égalité de tous devant la justice (p. 210). Une justice de classe ne saurait être impartiale (p. 217).

Les remarques de notre auteur sur le rôle de la défense dans les procès politiques sont également très intéressantes.

L'avocat ne se trouve pas dans une situation qui l'oblige à prendre la défense de l'accusé comme le médecin apporte ses soins à tout malade. Le défenseur ne peut pas perdre de vue que tout ce qu'il dira en faveur de l'accusé laissera inévitablement l'impression qu'il est solidaire de son client. Lénine, ainsi que le montre Kirchheimer, recommandait aux défenseurs politiques de s'efforcer de détruire par le ridicule les arguments de l'accusation, en laissant à l'accusé le soin de défendre ses actes (p. 245).

Tout cela montre que le crime politique est une sorte particulière d'infraction. Les codes et la recherche théorique les traitent à part.

Le livre de Kirchheimer n'est pas à proprement parler une étude juridique, encore qu'elle puisse être très utile aux juristes.

Le mérite de l'auteur est d'avoir mis l'accent sur les doutes qui ne peuvent pas ne pas naître quant au caractère criminel d'actes qualifiés d'hostiles à l'Etat et poursuivis comme tels, mais qui, en réalité, ne sont que des manifestations de mécontentement à l'égard d'un régime. Est-ce un crime que d'agir en faveur d'un changement de régime, que lutter pour un droit nouveau, que de critiquer le gouvernement ? Où est la frontière entre l'opposition légale et cette « lutte pour le droit », que le célèbre juriste allemand Ihering considérait comme le facteur naturel de l'évolution du droit ? Telles sont les questions posées par Kirchheimer (p. 31 à 35) ou qui découlent des faits produits et éclairés par lui.

Si Kirchheimer connaissait la littérature juridique russe, il pourrait trouver dans les travaux des représentants de l'école psychologique de droit, chez Petrajitsky *(Théorie du droit et de la morale)* et chez Guins *(les Idées modernes dans le domaine du droit)* bien des points communs avec ses propres considérations sur le caractère « conditionné » des normes juridiques, sur les « époques de transition » et sur l'évolution des notions d'« intérêt » et de « volonté » du peuple. L'enseignement de l'école psychologique, qui montre comment se crée le droit « intuitif », en désaccord avec le droit « positif » en vigueur (Petrajitsky), et comment à partir d'une foule de convictions intuitives concordantes naît une nouvelle conscience juridique (Guins), trouve, à son tour, une confirmation dans les données de Kirchheimer, ainsi que dans ses généralisations. La nécessité urgente de réformes devient parfois si évidente que seule l'issue — le succès ou l'échec — de la lutte pour ces réformes peut, dit Kirchheimer, résoudre la question de savoir qui a raison et qui a tort (p. 240). Quand les infractions à la

loi deviennent trop fréquentes, le pouvoir ne peut plus les châtier toutes et ne poursuit plus que ceux qui se préparent à l'« insurrection ouverte » (p. 241).

Comment sortir des contradictions et des conflits d'opinion sur les voies bonnes ou mauvaises menant à la réforme de l'ordre existant, sur la nécessité ou la nocivité des projets et programmes proposés ? Pour cela, il suffit de confronter les régimes totalitaire et démocratique. Kirchheimer définit le premier comme un système où la libre émulation des idées et des forces sociales est frappée d'anathème, où une planification et une direction centralisées remplacent les associations libres, mises hors la loi (p. 295). Le droit se transforme en instrument du pouvoir et chaque individu doit conformer sa vie et son activité au plan imposé d'en haut.

Qu'est-ce que la loi, quelles sont les sources du droit ? En République Démocratique Allemande, dont le régime est cité par l'auteur comme modèle de système totalitaire, le pouvoir exécutif considère la loi inscrite dans la constitution et n'importe quelle circulaire administrative, n'importe quelle résolution des organismes dirigeants, n'importe quel discours d'un chef du régime, n'importe quel article paru dans l'organe officiel du Parti, voire n'importe quelle conférence explicitant quelque point important de la doctrine communiste comme également impératifs (p. 297). La légalité, nous dit l'auteur, représente, dans ces conditions, une combinaison de la loi et d'une intention. Le juge n'est qu'un fonctionnaire entre d'autres, et il doit, comme tous, suivre strictement à la fois les ordres et les « signaux « donnés d'en haut et montrant la direction politique.

Au contraire, un Etat fondé sur le droit se borne à contenir les oppositions dans des limites garantissant la sécurité et l'ordre. L'opposition bénéficie de la protection de la loi, mais par là même s'impose à elle la conscience qu'elle doit rester dans les limites de la loi. La constitution de la Cinquième République donne au président de la République le pouvoir de mettre le parti communiste hors la loi, mais de Gaulle n'a pas usé de ce droit. Le respect de la légalité par l'une des parties incite l'autre à rester elle aussi dans le cadre de la loi. Au contraire, les violences commises en Algérie et en France par l'O.A.S. ont provoqué une inévitable réaction de contre-terreur. La justice politique, dit Kirchheimer pour conclure, sert les intérêts de la politique, mais ce service peut prendre des formes diverses. En régime totalitaire, le juge, devant une affaire politique, cherche la décision désirée par le pouvoir, alors que le juge d'un Etat fondé sur le droit garde la liberté de ses moyens d'action et s'inspire non de ce qui est nécessaire au pouvoir à un moment donné, mais de ce qui peut rester une décision valable aussi pour l'avenir (p. 424).

Le problème des délits politiques est complexe, car la politique fait irruption dans le domaine de la jurisprudence chaque fois qu'une affaire touche la défense du régime existant et les pouvoirs qui le représentent. Kirchheimer a raison de joindre à son livre deux chapitres spéciaux et très substantiels qui traitent du droit d'asile, dont l'usage est si fréquent de nos jours, ainsi que du droit de grâce ou d'amnistie, qui sont, dans une certaine mesure, des compensations au système de répression des ennemis d'un régime existant. Mais il manque à son livre certains principes conducteurs *de lege ferenda :* il aurait pu souligner que ne peuvent demeurer impunis des crimes contre les lois protectrices de principes moraux essentiels, comme celles qui poursuivent le terrorisme et la trahison ; mais qu'une opposition qui n'a pas recours à la force ne peut, en aucun cas, être considérée comme un crime ; que le système du parti unique est la base du régime totalitaire antidémocratique, violant le droit du peuple d'exprimer librement sa volonté, et que, vu la situation internationale, aucun Etat ne

peut retrancher derrière sa « souveraineté » et prétendre échapper ainsi à l'action des organismes internationaux, quand il se rend coupable de terreur massive et de génocide dans la poursuite d'ennemis de classe, ou d'adversaires politiques, raciaux ou religieux.

G. Guins

CHARLES WARREN HOSTLER : *TÜRKEN UND SOWJETS*. Die historische Lage und die politische Bedeutung der Türken und der Türkvölker in der heutigen Welt. Alfred Metzner Verlag, Francfort-sur-le-Main, Berlin, 1960, 264 pp. et 5 cartes.

Parmi les travaux scientifiques récents se trouvent des études particulièrement intéressantes et précieuses, s'imposant à l'attention du public et de la critique. C'est sans aucun doute à cette catégorie qu'appartient le travail du chercheur américain Charles Warren Hostler, publié pour la première fois en anglais en 1957 à Londres (*Türkism and the Soviets, The Türks of the World and their Political Objectives*. Georges Allen, Ltd.) et l'on doit se féliciter de l'initiative de l'éditeur allemand à qui nous devons la traduction allemande qui fait l'objet du présent compte rendu.

Au cours des dernières dizaines d'années, la science mondiale s'est enrichie de nombreux travaux concernant les peuples türks et la situation de ceux qui vivent en Union Soviétique. Il suffit de rappeler les œuvres des savants turcs suivants : Khalil Inaltchik, Akhmet Temir, Baymir za Hayit, Abdullah Soïsal ; celles des savants occidentaux que sont G. Jäschke, B. Spuler, J. Benzing, G. von Stackelberg, N. Poppe, W. Dubrowski, A. Bennigsen et maints autres qui ont apporté leur contribution à l'étude du monde türk passé et présent. Cependant, la plupart des travaux récents en ce domaine sont consacrés à des problèmes ou à des secteurs particuliers du monde türk : à la Turquie proprement dite, au Turkestan, à l'Idel-Oural, au Caucase et à la Crimée ou encore à des questions historiques spéciales. Parmi les travaux relativement peu nombreux et qui embrassent des ensembles assez larges du monde turc, il faut acorder une attention particulière aux très intéressantes études de G. von Mende : *Der nationale Kampf der Russlandtürken* (Berlin 1936), de Zeki Velidi Togan : *Bugünkü Türkili (Türkistan) ve yakın tarihi* (Istanbul 1942), et de R. Pipes : *The Formation of the Soviet Union. Communism and Nationalism. 1917-1923* (Cambridge, Massachusetts 1954). L'intérêt particulier du récent livre de Hostler consiste sans aucun doute en ceci qu'il s'efforce de présenter au lecteur un tableau large et complet du passé récent, de la situation actuelle et de la signification politique de tout le monde türk d'aujourd'hui. L'un des critiques de cette œuvre a eu raison de faire remarquer qu'il s'agit là de « la première et unique étude résumant l'ensemble de la situation » du monde considéré.

Le livre comprend cinq chapitres. Dans le chapitre introductif, l'auteur attire l'attention du lecteur sur l'importance mondiale du problème que soulève le monde türk, lequel occupe une surface immense, des rivages de la Méditerranée et de la moyenne Volga, à l'ouest, aux frontières de la Mongolie, à l'est, et fait, selon les propres termes de Hostler, l' « objet du grand litige géopolitique » de notre temps. Il est intéressant de faire remarquer que l'un des critiques anglais de l'œuvre de Hostler a souligné spécialement l'importance économique et stratégique de cet espace dans la politique mondiale actuelle. Dans le domaine politico-national, les moments les plus remarquables du problème pantürk furent, au XX^e^ siècle, la naissance et le développement de l'idée de türkisme, le mouvement de libération d'une Turquie nouvelle, nationale, avec à sa tête le grand Atatürk,

Political Justice. By Otto Kirchheimer. Princeton. $8.50.

A sophisticated but not cynical critique of the judicial process as an instrument of political power. Drawing upon a wide variety of cases, celebrated and obscure, the author has produced a work that will be consulted by students of the political process.

The Political World of American Zionism. By Samuel Halperin. Wayne. $8.

The struggle of American Jews to achieve national statehood. Carefully researched, dispassionately reported: a fascinating case study of one of our most complex interest groups, marred only slightly by the superimposition of currently popular but unnecessary conceptual apparatus.

Summer 1962
The Key Reporter

this is a special issue, touched upon only in a peripheral way in this careful and valuable study.

University of Alberta, Calgary FREDERICK G. HEYMANN

MICHAEL J. RURA, *Reinterpretation of History as a Method of Furthering Communism in Rumania: A Study in Comparative Historiography*. Washington, D.C.: Georgetown University Press, 1961. xi + 123 pp. $2.50.

Mr. Rura's study is a timely presentation of a theme which could more fittingly be entitled: "The falsification of history as a method of Communist indoctrination." The author tackles the subject in an academic way by comparing Rumania's pre-Communist historical tradition with that manufactured by the Communist historians. Implying that the old school laid itself open to attack by underscoring national themes and minimizing revolutionary currents, the author recognizes nevertheless that the basic preoccupation was the search for truth. The description of the methods used by current historians to destroy the traditional interpretation and substitute their own version makes it obvious that the term "reinterpretation" should properly be discarded.

Rejecting virtually all the traditional tenets as unscientific, current historians have changed the periodization to conform to the Marxist pattern, substituted Slavic for Roman origins, evaded religious and national problems by considering only social and economic ones, replaced exploits of princes with themes of social unrest, stressed the liberating role of Russia in contrast to the exploitation of the Western powers, censored all embarrassing problems, particularly in contemporary political history up to 1944, and filled the vacuum with a mythical Russo-Rumanian revolutionary theme. Mr. Rura stresses the methods by which all this was achieved by heading his chapters: Reinterpretation by omission, substitution, emphasis and corruption—a division which entails a certain amount of repetition. The author certainly deserves to be commended for his painstaking examination of Communist documentation—materials which are not always easy to obtain.

The weakest side of Mr. Rura's analysis is that dealing with Rumania's prewar historiography, which, assuming that there is a basis for comparison with that of the postwar period, is presented in an oversimplified way. The choice of authors cited is not sufficiently discriminating, and Mr. Rura too often bases his opinions on foreign writers who cannot be ranked as pre-Communist Rumania's foremost historians. Some of these lacunae stem from the unavailability of many traditional works in the West, which in itself provides eloquent testimony to the effectiveness of Communist suppression.

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OTTO KIRCHHEIMER, *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton, N.J.: Princeton University Press, 1961. xiv + 452 pp. $8.50.

The Introduction to Professor Otto Kirchheimer's volume seems to commit the author to a comprehensive analysis of a highly significant but extremely elusive phenomenon. But the actual structure of the book follows a considerably more eclectic design. As the table of contents indicates, the emphasis is upon certain selected phases or aspects of political justice, and its contribution lies in an exceedingly informative survey of examples of the thing being defined rather than a systematic exposition or inventory of its essential attributes. Part I is devoted to a review of the cases and methods illustrative of political justice; Part II to the complexion of the components of the trial situation in a political case, that is, the roles of judge and defendant vis-à-vis the state; and Part III to certain means by which political justice is modified, that is, asylum and clemency.

From an institutional point of view the chief merit of the book for Anglo-American readers lies in the author's survey of the work of the continental "constitutional courts" in relation to political controversies. His command of these sources is—at least to the best of this reviewer's knowledge—admirably complete, and it would be highly desirable if students of domestic public law would take more careful note of such comparative data.

From a more topical point of view, the author's principal contribution lies in his treatment of the predicament of democratic constitutional regimes (the so-called open societies) when confronted by claims to the exercise of freedom of speech, press, and assembly by organizations dedicated to the ultimate overthrow of governments which cherish such freedoms. Professor Kirchheimer's recurrent references to this problem—combining, as they do, a familiarity with both Anglo-American and continental precedents—are extremely valuable. This perspective, for example, enables him to discuss the clear and present danger test (which our own publicists have a tendency to praise or damn rather uncritically) with sober appreciation of both its merits and limitations.

The foregoing tributes must be offset by certain reservations. As already suggested, the promise of the book on the theoretical plane is hardly fulfilled. "Political Justice" cannot be adequately defined without putting down a firm jurisprudential foundation, and this Professor Kirchheimer does not do. His view of the relationship between law and the state, for instance, is only tangentially reflected in his discussion of other subjects. Consequently, the reader is deprived of a frame of reference for the concept of "legality" which is constantly and necessarily so employed in contradistinction to "that which is merely ordained by the Powers that Be."

This means that the book presents facets of his professed subject rather than the definitive categories the reader may have been led to expect. It also frequently means that the categories he does use are inadequately explained. In Chapter 4, for example, a minority regime's admittedly constitutional repression of democratic movements is treated as no less exemplary of illegality than a majority regime's unconstitutional repression of minorities. The inference here is either that the preconceptions of political democracy (the universal franchise, etc.) are directly incorporated in the rule of law, or that equality, in the sense required for full political democracy, is part of a natural law order which in turn furnishes the test of legality. Yet the reader cannot be sure that such an inference is intended

because a philosophical position sustaining them is nowhere formulated.

Finally, the author's style is not conducive to easy reading and it is sometimes ponderously verbose without the excuse of profound content. On page 6 of the introduction, for instance, the author demonstrates an uncanny ability to fatigue the reader in the course of a relatively short sentence. I quote: "The more elaborate the paraphernalia of authentication the greater the chance of vicarious popular participation in its conundrums."

It would be unfair to suggest that all his conclusions are similarly encumbered. Some of them are succinctly put and convey useful insights. I shall therefore conclude this brief review with another quotation, from the final paragraph of Chapter 3: "Thus the lasting results of the propaganda trial are likely to be paradoxical. The morality play, after serving the political needs of the day, will survive mainly as a testimony to its initiators' own frame of mind, which may well prove more distorted than that of their victim."

University of Washington KENNETH C. COLE

KLAUS MEHNERT, *Soviet Man and His World.* Translated by Maurice Rosenbaum. New York: Frederick A. Praeger, 1962. 310 pp. $5.95.

Soviet man in Klaus Mehnert's view is significantly different from his Russian grandfather, but not entirely a "new Soviet man." A German by birth, Mr. Mehnert was reared in tsarist Russia, educated in Germany and America, and has subsequently specialized in Soviet affairs. He resided and traveled in Russia on thirteen separate occasions, together totaling six years. Thus, he is uniquely qualified for his task.

In *Soviet Man and His World* Mr. Mehnert has analyzed the impact upon the present-day Russian of three primary influences: his heritage of traditional Russian characteristics, the forces of industrialization, and the pressures of Communist social engineering. His conclusions are perceptive and should be of interest and value to the specialist and layman alike. "The Russian of today," he stresses, "is more moderate, more disciplined, than his forebears; his boundless energy is absorbed by exacting labor and checked by strict laws" (p. 32). On the one hand, Soviet man respects (even though he somewhat resents) the privileged scientist and Communist functionary in much the same manner that his grandfather tended servilely to admire the elite in tsarist Russia. His fear of being spied upon and his distrust of all about him during the worst Stalin years have, significantly, failed to snuff out his inherited human warmth, boisterousness, and overt sympathy for his fellow beings and his gregariousness. Like his predecessor, he is reluctant to accept personal responsibility.

On the other hand, Soviet man's inherited capacity to endure hardship and bow to the inevitable has abetted Communist dictatorial rule. Despite the latter, however, the author believes that Soviet man has become more egotistical and not more collectivist minded. Indeed, after comparing Russians with Americans, the author concludes that Soviet man is more man than he is Soviet: he is, and likely will remain, more concerned with assuring his personal security, maximizing his privacy, and extending intellectual free-

POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By *Otto Kirchheimer*. Princeton, New Jersey: Princeton University Press. 1961. Pp. 452. $8.50.

This book is a definitive study of the use of the legal process by the state against individuals as an instrument of political power. "Something is called political if it is thought to relate in a particularly intensive way to the interests of the community." (p. 26) This reviewer has put the meaning of the term political as follows: "As the intensity of attachment of the actors in a situation of conflict to the competing values involved therein increases and the number of actors in the society who are involved in such value conflict increases, the likelihood will increase of the characterization of the situation as one of a political, rather than a legal, nature. . . . When conflict in a society involves competing group demands based on incompatible values held by such groups, its resolution is typically the task of the political process and institutions, rather than the legal."[1] In the view of Justice Jackson, decisions which are "confided to the political departments of the government . . . are delicate, complex, and involve large elements of prophecy . . . and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."[2]

The political trial involves the prosecution by the state of one or more individuals for the commission of criminal offenses. The offenses may be either common crimes or criminal acts directed against the state, such as treason and sedition. Modern security legislation seeks "to protect the political order from any intellectual, propagandist, and especially organizing activity directed toward revolution. . . . [T]he area of genuine political criticism is overhung by clouds which hide the light separating fact, fancy and wish. It is not easy to disentangle the components and isolate the maliciously slanderous contribution. Many a recent statute has ignored the difficulty, subjecting legitimate criticism to punitive provisions." (pp. 41, 43)

The political trial, as an instrument for achieving and preserving political authority, tears an incident loose from the historical context in which it was intertwined and turns the "strongest spotlights on it, to disclose its minutest detail. . . . The past is reconstructed for the sake of the future as a possible weapon in the battle for political domination." The trial requires a "segment of history" to be reconstructed. Although the past segment is part of "a still present conflict," the judge is allowed "to disregard its present elements and treat it exclusively as a past event." But any trial entails risk that its reconstruction of a past event through the

1 CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY, ch. VII (to be published by the University of Illinois Press, Urbana, 1962).

2 Chicago & So. Air Lines, Inc. v. Waterman S.S. Co., 333 U.S. 103, 111 (1948).

testimony of witnesses will not take place as anticipated. In the political trial, it is imperative that witnesses reenact their predetermined roles with scrupulous fidelity, otherwise the political message which the trial was intended to communicate will be lost. (pp. 110-12)

The use of the legal process to suppress groups who dissent in principle from an established regime "has been directed so far against small groups of little importance in domestic affairs. . . . Open repression . . . is bound to miss the target and repel friends when the persecuted group assumes the stature of a mass movement, controlling a large segment (say, more than twenty percent) of the popular vote. . . . Even if a combination of social and economic pressure and police operations were enough to enforce the ban, there might be enough resistance to throw the judicial machinery out of gear and cancel what is the benefit of limited repression, the chance to preserve intact the legal process and the framework of democratic institutions." (pp. 159-60)

The degree of consensus of a society upon a single value system or, put in opposing terms, the heterogeneity of a society in terms of its sharing of values and the priority accorded values, is a factor of first importance in the viability of its legal system. The author develops this principle as follows: "The meaning of legal consciousness in a heterogeneous society thus offers special problems. If no informal consensus exists on fundamental community issues, the judges cannot play their traditional role in realizing the community value structure and pointing it up in relation to specific issues. . . . Impartiality presupposes a commonly accepted starting proposition. If as his point of departure the judge uses propositions which are emphatically rejected by substantial elements in the community, he will not be able to rely on the presumption of obedience owed to his office, even if he can show that he has adhered with some consistency to his initial proposition." (p. 215)

Dissent from the politics of an industrial society will reject the ethic of conformity and embrace instead loyalty to a group or cause: "The politics of an industrial society have often become a rational interplay of interest organizations whose outward form is a gigantic and permanent popularity contest. Members of the legal profession functioning as custodians of the political game must themselves conform to its rules and precepts. Why, then, should anyone else be privileged to reject the prevailing political framework and insist on recreating politics in the image of a community resting on loyalty to group or cause rather than on rational, civilized, if uninspiring, calculation of profit and loss?"

The lawyer's task in a political trial taking place in a mechanized, standardized, conformist society is to use "creative ingenuity . . . in whipping diffuse elements of a given situation into convincing enough shape to obtain a favorable reaction for his client." (p. 243) A functionary of the Czech

Lawyers' Organization pointed to the dichotomy of the lawyer's devotion to the interest of his client and public interest, which is involved in a political trial, as follows: "If the lawyer wants to keep to the principle that he has to preserve the interest of his clients in conformity with the interests of society and the principle of objective truth, he has to analyze clearly every case. He has to conform to the objective truth and the interests of society. For this reason we use the term 'justified interest of the client,' and *only those interests may be taken care of by the lawyer.*" (p. 244) (Emphasis supplied.)

The author examines the history of the manner in which political trials have been used to protect regimes from subversion and overthrow. The principles governing the use of political trials as a support for authority are elucidated and developed through illustrative examples. The requisite characteristics of the roles of the defendant and his lawyer, together with the prosecutor and the judge, are thoroughly explored. There are many perceptive statements about the nature of the judicial process and the task of the judge in trials of this character.

One chapter is devoted to the operation of the judicial process in societies characterized by "democratic centralism," in which the judiciary became integrated with the political institutions. In such societies, the judiciary becomes an instrument for attaining the changing political objectives of the state. "The essence of socialist legality, then, is guaranteeing that orders and signals are unfailingly observed at all subordinate levels. . . . When policies and official interpretation change, legality attaches to the new task at hand. Under no condition is it called upon to mediate between today's objectives of the sovereign and yesterday's expectations of the subject." (p. 298)

The Nuremberg trials are explored as an aspect of trials by successor regimes. They are termed "the most important 'successor' trial in modern history." With respect to the crime against peace charge, the author states: "Had the noble purpose of the crime against peace charge succeeded, had it helped to lay a foundation for a new world order, the uncertain juridical foundation of the charge would now be overlooked and the enterprise praised as the rock on which the withdrawal of the states' rights to conduct aggressive warfare came to rest. At the coalition pursuing the Nuremberg enterprise broke up before the ink on the Nuremberg judgment had time to dry, the dissensions among the wartime partners threw a shadow over the whole affair." (pp. 323, 324)

With regard to the crimes against humanity charge, the author concludes: "The newly coined crimes against humanity concept (Article 6c of the charter) corresponds to a deeply felt concern over the social realities of our age: the advent of policies intent on and leading to debasing or blotting out the existence of whole nations or races. But if the social and

political mechanism employed in such cases is unfortunately very clear, the legal formulas to cover and repress such actions remain problematic. In the absence of a world authority to establish the boundary line between atrocity beyond the pale and legitimate policy reserved for the individual state, the French government and its Algerian foes, the South African government and the representatives of the downtrodden negro and colored population, not to mention the Hungarian regime and its adversaries and victims, might continue to have a very different viewpoint on the meaning of the concept." (p. 326)

The final appraisal of Nuremberg is that: "The concrete condition under which the Nuremberg litigation arose and the too inclusive scope of the indictment may make it difficult for us to separate the circumstantial elements which it shares with all other successor trials from its own lasting contribution: that it defined where the realm of politics ends or rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity." (p. 341)

The concluding portion of the book is entitled "Political Justice Modified: Asylum and Clemency." It embodies a "search for rational elements in asylum and clemency practice." (p. 349)

This review has summarized the highlights of the author's thesis to demonstrate the thoughtful, analytical manner in which data of political trials are employed to develop in a creative way significant principles and propositions in political and legal theory. The literature of law and jurisprudence has only episodically and tangentially dealt with the problem of the political trial, which the author investigates with such thoroughness. This study focuses directly upon the principal aspects of the problem and is a most important contribution.

Kenneth S. Carlston,
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Three long essays on mental hospitals—generally from the point of view of an inmate—preceded by an essay "On the Characteristics of Total Institutions." The materials presented in the studies of mental hospitals are of considerable interest and raise significant questions about the effect of hospitalization on therapy. The introductory essay, however, is far more speculative in character and finds Goffman engaged in attempting to discover a "solid framework bearing on the anatomy of this kind of social animal." The "social animal" is the "total institution"—"a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life" and Goffman draws his materials from accounts of life in nunneries, prisons, military establishments, and concentration camps, as well as mental hospitals. The analogies which result between nuns, mental patients, soldiers, prisoners and mother-superiors, nurses, officers, and wardens are tempting, but doubts remain as to their "solidity."

GOFFMAN, ERVING. *Encounters: Two Studies in the Sociology of Interaction.* (Advanced Studies in Sociology, Vol. I.) Indianapolis, Ind.: Bobbs-Merrill Co., 1961. Pp. 152. $1.95.

Two studies of a species of "face-to-face interaction" which Goffman chooses to call "focused interaction," "Focused interaction occurs when people effectively agree to sustain for a time a single focus of cognitive and visual attention, as in a conversation, a board game, or a joint task sustained by a close face-to-face circle of contributors." The first of the two papers ("Fun in Games") "approaches focused gatherings from an examination of the kind of games that are played around a table," the second ("Role Distance") "through a review and criticism of social-role analysis."

HUTCHINS, ROBERT MAYNARD, and ADLER, MORTIMER J. (eds.). *The Great Ideas Today.* Chicago: Encyclopaedia Britannica, 1961. Pp. viii+562. $8.95.

The formula for the construction of this book (the first of an annual series) is to combine the *Britannica Book of the Year* with *The Great Books of the Western World.* The results are unusual, but not so alarming as might be anticipated. There are hundreds of pictures (including some in gorgeous technicolor); the "Great Debate of the Year" ("Is democracy the best form of government for the newly formed nations?" discussed by William O. Douglas and Peregrine Worsthorne); a review of world affairs during the year by the editors (in which *The Federalist,* Plato, Aristotle, and Herodotus are used to illuminate the presidential election); a review of significant developments in literature (Mark Van Doren); physical sciences and technology (Walter Sullivan), social sciences and law (Edward Shils), biology and medicine (Gilbert Cant), and philosophy and religion (George P. Grant); and finally additions to the Great Books Library of complete works by Dewey, Einstein, Molière, and Toynbee. A sophisticated and urbane production for a large audience.

KIRCHHEIMER, OTTO. *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton, N.J.: Princeton University Press, 1961. Pp. xiv+452. $8.50.

A study of "the most dubious segment of the administration of justice, that segment which uses the devices of justice to bolster or create new power positions." Not a collection of cases or a history, but an attempt to "relate the political content to the juridical form under which cases take place." A massive, systematic study raising fascinating and important questions.

KISSINGER, HENRY A. *The Necessity for Choice: Prospects of American Foreign Policy.* (Anchor Book A282.) Garden City, N.Y.: Doubleday, 1962. Pp. xii+387. $1.45.

In this book, originally published in 1960, Kissinger presents crisp, sharply reasoned doctrines about deterrence, limited war, Germany, NATO, negotiations, arms control, political evolution, the new nations, and the relation of the intellectual to policymaking. In general, the author stresses the necessity for making many hard choices, the fact that there are no easy solutions to any of the problems involved, and his conviction that there is not much room for either error or indecisiveness.

KOCH, ADRIENNE. *Powers, Morals, and the Founding Fathers.* (Great Seal Books.) Ithaca, N.Y.: Cornell University Press, 1961. Pp. ix+158. $1.95.

A volume assembling "a group of essays that have appeared in various journals over a period of ten years." A study of five "philosopher-statesmen"—Franklin, John Adams, Jefferson, Madison, and Hamilton—centered on the relation in their thought of the "supposedly contradictory" terms "power" and "morals." Argues, in fact, that "the republican experiment" of the American union "can still serve as a model to all the world, as the founding fathers hoped, because they, by their joint activity, saw the necessity for the constant balance and tension of power and morals."

« boîte à lettres » et les cabinets « tentaculaires » (p. 306). L'auteur s'attache également à décrire les relations des fonctionnaires et des parlementaires ; dans un passage d'une grande finesse psychologique, il compare leurs optiques, leurs préoccupations et leurs comportements et insiste, fort justement selon nous, sur le fait que leurs attitudes respectives sont plus complémentaires qu'antagonistes.

L'ouvrage s'achève sur un des thèmes fondamentaux de la science administrative, celui des rapports entre administration et public et on ne peut que souscrire aux vues de l'auteur sur la nécessité d' « ouvrir l'administration sur l'extérieur ». C'est en cela, à notre sens, que réside la véritable réforme administrative.

Au total, *Le fonctionnaire français* peut être d'ores et déjà considéré comme un classique de la « littérature administrative ». Sans être un ouvrage de science administrative au sens étroit du terme, il offre un témoignage dans lequel chercheurs et fonctionnaires trouveront maints thèmes de réflexion.

Souhaitons que R. Catherine n'en reste pas là et que, poursuivant et développant les analyses contenues dans ce livre, il nous présente bientôt un bilan des problèmes de l'administration française. Sa triple qualité d'administrateur, de professeur et de directeur de la *Revue administrative* lui donne des titres particuliers à entreprendre une telle synthèse.

Bernard GOURNAY

KIRCHHEIMER (OTTO) — *Political justice*. The use of legal procedure for political ends. — Princeton (N.J.), Princeton University press, 1961. 24 cm, XIV-452 p. Index. $ 8.50.

Voici un ouvrage de grande valeur dont il faut espérer une prochaine édition française. Pour s'attaquer à un tel sujet, l'auteur devait être à la fois juriste et politiste, avoir une large culture historique et un sens aigu des réalités de notre temps. Otto Kirchheimer remplit parfaitement ces conditions. De plus, sa triple expérience de l'Allemagne, de la France et des Etats-Unis, où il occupe une chaire de science politique à la Columbia University après avoir été pendant de longues années chargé des affaires européennes au Département d'Etat, lui a permis de se placer tout naturellement dans une perspective comparative et de tenir compte à chaque instant de la tradition juridique et idéologique du pays considéré. La richesse de la documentation est étonnante. Les références à la France, par exemple, ne comprennent pas seulement des livres du XIXe siècle ou des traités de droit, mais aussi les analyses de Casamayor, les articles de J.M. Théolleyre, les prises de position de Me Halimi dans les *Temps modernes*, incorporant encore le bilan « Les atteintes à la sûreté des Français » paru dans *Esprit* en mars 1961. La documentation allemande ou américaine est aussi variée et aussi à jour.

Pour exposer les résultats de ses recherches et de ses réflexions, Kirchheimer a rencontré une difficulté classique : comment faire comprendre la complexité d'un cas sans se perdre dans les détails ? Comment systématiser

sans renoncer à l'analyse minutieuse ? Il l'a résolue par un compromis qui a l'avantage de rendre la lecture à la fois variée et constamment intéressante, et l'inconvénient de faire perdre parfois le fil du développement, retenu qu'on est pendant un long moment par l'exposé détaillé d'une affaire particulière. L'auteur entremêle en effet l'exposé synthétique et la présentation par la méthode des cas. C'est ainsi que, sur les six sections du chapitre III, « Le procès politique », cinq sont systématiques. Mais après « Procès politique et procès criminel » et « Le procès pour meurtre comme arme politique », on trouve « Etudes de cas pour la signification de la trahison » avec une présentation originale de deux procès célèbres, l'affaire Caillaux ou le cas de « l'opposition comme trahison » et le procès en diffamation intenté par le président Ebert contre un journaliste de droite. Parfois, c'est la majeure partie d'un chapitre qui est consacré sinon à une seule affaire, du moins à un seul pays : le chapitre « Le " centralisme démocratique " et l'intégration politique du judiciaire » porte presque uniquement sur l'organisation de la justice en Allemagne de l'Est et la moitié du chapitre « Jugement par ordre du régime successeur » parle du procès de Nuremberg. Mais qu'il s'agisse d'exposé systématique ou d'analyse de cas, jamais Kirchheimer ne verse ni dans l'abstraction gratuite ni dans le récit anecdotique.

Le livre est divisé en trois parties inégales, la troisième traitant de deux sujets qu'on ne rattache pas d'habitude à la justice politique : le droit d'asile et la clémence, cette dernière incluant les divers types d'amnistie. Qu'est-ce qui caractérise donc cette justice politique dont le contenu et les méthodes sont étudiés dans la première partie ? C'est une justice où « l'action de la Cour est mise en œuvre pour exercer une influence sur la distribution du pouvoir politique ». Cette action peut être amenée par un gouvernement contre ses ennemis politiques, par un régime contre ceux qui le mettent en cause, par les adversaires des gouvernants pour les discréditer, etc. L'utilisation de la procédure est parfois plus déterminante que le contenu de l'accusation pour savoir s'il y a procès politique (affaire Calas, affaire Kravchenko, etc.) De plus, l'état de l'opinion, la nature de l'idéologie dominante, les mécanismes institutionnels eux-mêmes interviennent sans cesse dans l'élaboration et l'interprétation de la loi. Ainsi le simple désir d'un changement constitutionnel a longtemps été considéré comme un délit. Dans la plupart des pays « occidentaux », il n'en est plus ainsi. En revanche, toute une philosophie juridique de l'atteinte à la sûreté de l'Etat, de la subversion non seulement exécutée mais projetée s'est développée dans les Etats qui se veulent les plus libéraux. Kirchheimer analyse la loi fédérale suisse de 1950 et l'affaire André Bonnard qui en est résultée (un professeur à l'Université de Lausanne avait communiqué des renseignements sur la Croix-Rouge suisse au Mouvement de la Paix). Il s'étend plus longuement sur l'étrange situation de la République fédérale face à l'Allemagne de l'Est, étudiant notamment les affaires John et Agartz. Il consacre un chapitre entier à « la répression légale d'organisations politiques » en partant de nombreux cas du XIX^e^ siècle pour aboutir à un examen serré des critères de répression utilisés contre les groupements con-

sidérés comme antidémocratiques. Dans le cas de l'action anticommuniste aux Etats-Unis et en Allemagne, le verdict de la Cour, dans la mesure où il est fondé sur la doctrine du groupe incriminé plutôt que sur son action, devient, selon la formule du juge Jackson, « une prophétie sous forme de décision légale ». Les conclusions que Kirchheimer donne à ce chapitre sont pondérées à souhait.

La seconde partie est consacrée aux acteurs : le juge, l'accusé, le défenseur, l'Etat. L'auteur montre l'influence qu'exerce sur la justice politique la sociologie de la magistrature. Dans sa conclusion générale, il insistera de nouveau sur le rôle particulier des magistrats s'il y a changement de régime (il cite Pasquier disant en 1850 : « Je suis l'homme de France qui a le plus connu les divers gouvernements qui se succèdent : je leur ai fait à tous leur procès ») et sur la notion d' « espace judiciaire », c'est-à-dire de pouvoir d'appréciation laissé au juge par le pouvoir ou par l'idéologie dominante. Le comportement de l'accusé est surtout intéressant à étudier à propos de sa volonté d'identification à un groupe, tandis que le problème de l'avocat est celui de l'identification à la cause politique du client. Nous ne pouvons pas entrer dans le détail de considérations dont la pertinence et l'actualité sont saisissantes si on les applique à la France des années 1960.

On peut bien entendu regretter que tel ou tel aspect auquel on attache soi-même de l'importance n'ait pas été mieux mis en évidence. Ainsi la notion de légitimité, ainsi le concept de trahison. Tel ou tel passage peut aussi paraître insuffisant. Les quelques pages consacrées à la justice sous le III[e] Reich sont bien rapides. On doit aussi déplorer l'absence de toute bibliographie systématique. Mais il est difficile de ne pas admirer et approuver la lucidité et la netteté des conclusions qui montrent à la fois la faiblesse et l'utilité de la justice politique. La faiblesse est généralement admise. Qui ne dirait avec Kirchheimer : « S'il est vrai que le jugement peut entrer dans l'histoire, il est rare qu'il devienne le verdict rendu par l'histoire elle-même » ? L'utilité résulte déjà de la supériorité que la procédure présente par rapport à l'arbitraire pur. Elle provient aussi des répercussions du procès sur l'opinion et, par contrecoup, sur la répartition des forces politiques. La caractéristique fondamentale de ce livre si riche et si stimulant est peut-être d'être vraiment un ouvrage de science politique, c'est-à-dire de tenir compte de toutes les dimensions psychologiques, sociologiques et institutionnelles d'un sujet en apparence purement juridique.

Alfred GROSSER

WALKER (NIGEL) — *Morale in the Civil service*. A study of the desk worker. — Edinburgh, the University press (1961). 22 cm, x-302 p., tabl., pl. Index. 30 s.

L'étude que vient de publier N. Walker représente une remarquable contribution au développement de cette discipline que l'on qualifie non sans quelque outrecuidance de science administrative. Elle montre, après les enquêtes de

POLITICAL JUSTICE; The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. [Princeton University Press; London: Oxford University Press. 1961. xiv and 452 pp. (with index). 68s. net.]

THIS is an important book. Although much has been written on political justice and many aspects of it have received close study I am not aware that any full length study of it has previously been made, at any rate in English. The book, as appears from its sub-title, is concerned with the interplay of politics and law, or rather of politicians with the lawyers of whom they make use for the purpose of overcoming their political opponents. The author is exceptionally well equipped for his task, to which he brings a wide general culture, long experience of the working of an important civil law system (that of Germany during the inter-war period, a time of considerable tension), and a subsequent career of distinction as a professor of political science at Columbia University.

Politics and justice are uneasy, indeed unhappy, bed-fellows. To the layman political justice is a contradiction in terms, and few lawyers would disagree with this opinion. Moreover, most people would say that there never has been a time when political injustice was more rampant and blatant than it has been in the present century. Professor Kirchheimer's study is mostly concerned with the history of our own times, but his book frequently harks back to earlier periods, even as far as classical Greece and Rome, and what he has to say about those ages suggests that we in our time have been no worse off, indeed perhaps rather better; for over the years methods of tempering the wind to the shorn sheep have been perfected, and have come into more widespread use, however sporadic and fitful this may have been. Moreover, difficult as it may be to pierce the fog of propaganda and counter-propaganda, the fact that the eye of the world is easily turned to any area in which injustices are alleged to be occurring is undoubtedly not without its effect. Thus, when the International Commission of Jurists issues one of its reports the Press coverage is very wide, and the reactions of the parties reported upon show a noteworthy sensitivity to criticism.

In theory, political justice is concerned with the protection of the state against its internal enemies who may of course include external foes who have planted themselves within the territory of a state for ease of operation. In practice, of course, a social class which has secured power, or even a set of

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party politicians, may equate themselves with the state for purposes of protecting their own interests. It is naturally the second type of political justice, in practice almost invariably unscrupulous, and often cruel in addition, which attracts the hostility of the historian or the contemporary critic. But actually the worst excesses have often occurred with the support of the mass of the community at times when a state has in fact been in peril; for the maxim *salus populi suprema lex* is apt to give *carte blanche* for oppression, and Professor Kirchheimer gives many instances of this.

The analysis is divided into three major sections. In the first the author is concerned with the actualities of political justice which in effect centre round the destruction or weakening of opposition groups, either by bringing the leaders to trial or repressing them, perhaps by flat-out methods, perhaps by sapping and undermining: these latter may be administrative, but more likely will bring in some semblance of legality, for as de Toqueville observed in a passage of profound insight which Professor Kirchheimer quotes at the very forefront of his work, the opinion of mankind grants authority to the intervention of courts even when the substance of justice has long evaporated from their operations.

The structure of state protection has varied a good deal down the ages, but in the era of constitutionalism it became pretty well accepted in modern states that regard should be had to legal process, and even in the totalitarian era lip-service has continued to be paid to this principle.

Professor Kirchheimer has some shrewd, if rather unkind, remarks to make about the attempts of conventional lawyers to evade the issue of the political trial by the contention that it is not to be differentiated from an ordinary criminal trial. He contends that the identical character of the procedure should not lead to confusion as to the objectives being the same. It might perhaps be said that the more liberal the state the more the two types of trial approximate, and certainly in England it is a narrow run of cases which could qualify for the distinction, since our political trials are now almost invariably framed under special statutes, sedition cases having become exceptional.

Professor Kirchheimer, however, has no difficulty in producing examples of political trials from modern liberal states. Thus he gives a fascinating account of how Clemenceau was able to immobilise his opponent Caillaux, the chief protagonist of a negotiated peace during the First World War, by an accusation of treason, never of course tried out.

More generally useful in liberal states because it does not require war, or near war, conditions to get it going, is the libel suit. To goad a political opponent into an action for libel is an old trick, and one for which left wing politicians should seldom, if ever, fall. Should they do so, they will not only imperil their own careers, but may well prejudice the political standing of the party to which they belong. The *Ebert* case, fascinatingly unravelled here, is a classical instance of this: it undoubtedly helped to bring the Weimar Republic and all that it stood for into disrepute. Professor Kirchheimer stresses how political propaganda can be magnified via court-room proceedings in a mass democracy where a cheap Press is at the disposal of the politicians conducting the offensive.

How the area of prohibited activity may be enlarged so as to bring opponents within the net of the law is shown in the next section; though the operators must be pretty wide-awake or the weapon may turn in their hands. This of course happened more than once with the Nazis.

Trials are not effective for these purposes unless held in public, or at any rate partly so. And in the modern period this means on a world stage where something may go wrong with devastating results. So on the whole the opposition parties will be repressed by other means. How far these other means should be legal, superficially at any rate, may be difficult to judge.

The various factors involved in such decisions are most interestingly analysed by Professor Kirchheimer in the fourth chapter.

In Part II, which is the longest in the book, the author deals with what most lawyers will regard as the most fascinating and worrying area of his subject; that is the personal part played in all this business by judges, lawyers, and others who are brought in to administer the so-called justice. Many aspects of this side of the matter, which will probably not have occurred to English lawyers, are brought out here, such as the peculiar vulnerability of most Continental judges, whose careers are entirely in the hands of the political administration, to pressure from that source. Professor Kirchheimer has much of interest to say on the subject of the selection and promotion of judges in the light of this political problem.

In totalitarian states the show of impartiality on the part of the judiciary is hardly maintained, and it is here where "democratic centralism" is the slogan that the most obvious injustices are apt to occur. Nevertheless, the situation is only superficially simple, and much light is in fact thrown upon "the nature of law and the judicial function" even in the unsavoury surroundings of Nazi and Stalinist repression.

In this section of his book Professor Kirchheimer devotes a great deal of space to a rather elaborate discussion of the legal activities of successor régimes. The increasing importance of the political trials held by victorious nations after wars, or by successful parties after civil wars, is in itself a recognition of the place which justice holds in the minds and hearts of men. Successor régimes have been sensitive to this, but they are even more sensitive to the need for the maintenance of their prestige. This means that the trials must result in convictions, at any rate in the more important cases. There has of course been a flood of argument on this subject since Nuremberg, and Western writers have tended to be apologetic about the whole business. Professor Kirchheimer in a moving passage puts the subject back where it ought always to have been, in the sphere of justice. We are searching, he says, "for a fundamental notion to which all groups and nations must at least submit, if not always subscribe. Respect for human dignity and rejection of the degradation of human beings. . . ." All that he has to say in this chapter is worthy of close attention.

Fascinating and thought provoking as are the earlier parts of this book it must be confessed that they make gloomy reading. In the third part we get some relief, for Professor Kirchheimer here discusses those elements which have from early times acted as a break in many of the worst periods of political injustice. I hope that I shall not be regarded as cynical when I mention that this is very much the shortest section of the book. The most important of these, legally speaking at any rate, is asylum. And it is characteristic of the author's wide-ranging scholarship that he introduces this subject with an incident from Herodotus. Asylum was of course well recognised in classical times, but legally it has always been a "perplexing subject." Recognition as a "right" in the Universal Declaration of Human Rights possibly enhances its prestige as an institution, but it may be doubted whether this has been of any real help to any one refugee, and as Professor Kirchheimer himself points out, changing concepts in relation to extradition have in the atmosphere of ideological struggle and the cold war done a great deal to weaken the value of asylum. In Great Britain, which formerly prided itself upon being a refuge for the politically oppressed, political defences to extradition applications seldom seem to succeed, and one feels that the old liberal ttitude of our courts has been a casualty of the cold war, if indeed it had t become moribund in an earlier generation.

Clemency is of course another possible outcome of a political trial, and does ct occur from time to time, though it must be confessed that it seems likely to occur on the other side of the iron curtain than in the West.

However, it is not at all easy to assess the genuineness of the mercy element in the release by the Russians of such offenders as Gary Powers: clearly the political propaganda value of clemency in these cases is high, and Communist states seem to be much less merciful to their own nationals. On the other hand, it is unfortunately clear that from Sacco and Vanzetti to the Rosenbergs and Morton Sobell the record of the U.S. administration has been of the merciless type which one associates with fear, and a haunting doubt of the moral validity of one's case. *Homo hominis lupus.*

C.

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April 1964

CTH

POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By Otto Kirchheimer. Princeton: Princeton University Press. 1961. Pp. xiv, 452. $8.50.

In the classical sense all justice dispensed by state authorities is political justice. But that is not the way in which the term is used by Otto Kirschheimer, professor of political science at Columbia University and member of the graduate faculty of the New School for Social Research. In this study he is concerned with "political justice" as conceived traditionally by European writers, namely, as a shorthand way of describing the employment of the machinery of justice, but especially trials, to protect or advance the position of those who hold power within the state. His method is comparative and analytical, with materials drawn from Germany, East Germany, France and Italy, and with slighter attention given to the experience in the Soviet Union and the United States. The author's range is wide and deep, for although his primary emphasis is on post-World War II developments, he draws data from earlier periods in history in order to show more clearly the distinctive qualities of political justice in the modern era. The wealth of materials concerning political trials in the modern European setting, much of it unavailable to non-specialist American readers, would be sufficient in itself to stamp this a work of importance.

But perhaps the very richness of materials, the frequent interjection of unfamiliar references, as well as a rather formidable literary style, will deter many readers. Perhaps too, the author's high degree of success in maintaining a value-free, almost cynical approach to various political-legal issues will tend to weaken the book's overall impact for most readers. There are few exceptions. Kirchheimer concludes, for example, that the Nuremberg trial of Nazi leaders, while deficient in a number of important respects, represented "the feeble beginning of transnational control of the crime against the human condition" which "raises the Nuremberg judgment a notch above the level of political justice by fiat of a successor regime." (at 341) Such judgments are rare in this book. For the most part the author is content to describe the forms of political action directed against those who allegedly have posed threats to the security of the state, taking note of the position of the various participants, the defendant, his counsel, the prosecutor and the court. Only rarely does he touch the crucial question of whether a proceeding was necessary in order to protect a legitimate interest or was fair in form and in result.

Perhaps the very term "political justice" is unfortunate because too broad and heavy with invidious connotations. When, as used here, it encompasses communist trials in a system where

most crimes are political offenses, trial of former political leaders by successor regimes, as in the international proceedings at Nurenberg, and a wide variety of other offenses ranging from trials of assassins to Smith Act cases in the United States, there is a tendency for the important and the trivial to blur, and for defensible judicial action to become confused with proceedings that have only the faintest association with a system of justice. For it must be true that certain actions taken in defense of the state are appropriate and just. If not, the whole process by which a society seeks to act through political instrumentalities becomes a grotesque game and the concept of law is rendered meaningless. The liberal tradition of the Western nations envisages a wide area of freedom to protest and to work toward peaceful replacement of a government in power and significant changes in the political system itself. The efforts in American law to devise a suitable test distinguishing permissible political action from that which need not be tolerated by the state is a familiar story. It may well be that the line drawn against political agitation by the Supreme Court in 1951 marked an unnecessary interference with a political force that has never posed a serious threat to our political institutions. But even under the clear and present danger test it is possible to envisage situations in which a larger and more forthright group than the American communists have been in the past might be deemed a sufficient threat to justify conviction of its leaders or suppression of the group's organized activity.

Clearly a state is under a duty to oppose assassination and violence as an accepted form of political protest. If an unjust or corrupt regime is to be overthown, however, how can it be accomplished save by resort to violence? Is defense by the state justified? In positive law the answer must be affirmative, but relying on the judgment of history to vindicate acts that superficially viewed appear unlawful, the revolutionary group appeals to a different and higher law. And thus, many revolutionary efforts will be judged not merely illegal but unjust in their attempt to destroy a legitimate government.

To an American reader, the frequency of examples of "political justice" in continental Europe in the modern era may give cause for excessive self-congratulation. It is true that in Great Britain during recent centuries and in the United States there have been relatively few occasions when the state has been seriously threatened by political opponents, at least if one conveniently overlooks the events of 1861-1865, although the generosity of Lincoln and Johnson in dealing with defeated leaders of the Confederacy contrasts sharply with the harsh reaction of political leaders in comparable European episodes. But it has been the

lack of serious internal threats that has made possible the relatively clear British and American record. British repressive efforts toward political enemies have taken place in territories far removed from the homeland. And as our handling of Japanese-Americans in World War II showed so well, we are not too scrupulous about the course of justice when a danger is thought to exist. But fortunately we have not been a divided nation, apart from the Civil War trauma. In short, we should be grateful for the various circumstances which have made possible in the United States and modern Britain thus far a continuing consensus on the goals and values of our system. The adherence to "rules of the game" which require our defeated parties and their leaders to accept the result of free elections arises from the general health of a free society, rather than some special wisdom or sense of restraint where actual or potential political offenders are to be dealt with. Kirchheimer's study should, at the least, make us more alert to the dangers of misuse of justice in the United States to destroy the political and social enemies of those in power. The vivid history of "political justice" in seventeenth-century England shows how deep-seated political and social divisions will inevitably have an adverse effect on the administration of justice.

One further thought arises from a reading of Kirchheimer's interesting study. Perhaps the comparative method which is so fruitful when employed in a limited way is less successful when employed on a large scale as in this study. By making impossible any delineation of the deeper strands of historical and cultural development, and analysis of the complexities of social, economic and political life which distinguish one people from another, the reader gains only a superficial impression of causal factors. Only readers with an intimate knowledge of the history and social institutions of the nations whose experiences with political justice are described in this work can appreciate fully the significance of many of the author's subtle insights. On page after page too many judicial events seem to happen almost by chance because the causes are too deep and complex to permit detailed explanation. It is because he touches on so many themes that go to the very heart of political philosophy that one wishes the author had permitted himself a somewhat fuller role as political analyst and commentator. But no reason exists why the reader should refrain from assuming that role, stimulated as he must be by this wide-ranging account of the frequently tragic and unjust efforts to use the forms of justice to achieve political objectives.

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spécifique et une continuité certaine, particulièrement en ce qui concerne les deux grands principes de base du léninisme, à savoir la domination du Parti sur les masses, qui a comme but final la révolution mondiale, et la négation de la liberté individuelle telle qu'elle est comprise en Occident, avec son corollaire économique : la lutte continuelle du Parti contre l'entreprise privée et contre l'accumulation de la propriété privée.

Labedz et son équipe d'experts parlent trop brièvement de cette continuité et de cette logique spécifique du marxisme-léninisme officiel ; par contre ils nous entretiennent abondamment de l'autre aspect de la question, auquel nos observateurs des problèmes soviétiques accordent trop peu d'attention, à savoir les « girations » de la pensée marxiste, dont, nous affirme la prière d'insérer, Labedz est un éminent spécialiste. Ces « girations » sont bien entendu le signe du risque extrême que court le marxisme moderne antiléniniste, incapable, en dépit du brio intellectuel de ses promoteurs, de se dégager complètement des contradictions de la doctrine classique.

Après une lecture complète du *Révisionnisme* — que doit entreprendre tout étudiant sérieux du marxisme-léninisme — les restrictions imposées dans le passé aux philosophes soviétiques et maintenant aux philosophes des pays satellites, la série des chasses aux sorcières idéologiques, des purges et des auto-accusations philosophiques deviennent compréhensibles. Aussi compréhensible est la détermination des idéologues soviétiques de coller à Lénine, même si cela signifie en même temps l'abandon de Marx.

C. Olguine

OTTO KIRCHHEIMER : *POLITICAL JUSTICE.* The Use of Legal Procedure for Political Ends. Princeton University Press, Princeton, N. J., 1961, 452 pp.

Comme son titre l'indique, le livre d'Otto Kirchheimer, *Justice politique*, est, en même temps, une étude juridique et un traité politique consacrés aux particularités des crimes politiques et aux différentes façons de les combattre. Ce livre est profondément actuel, tant par son sujet que par son contenu. La vaste érudition de l'auteur lui a permis de conduire son investigation sur la base non seulement des événements des dix dernières années, mais encore de ceux d'un passé lointain. Le lecteur peut ainsi comparer et apprécier la pratique de ce passé lointain avec les moyens dont on use de nos jours pour lutter contre les crimes politiques, avec ou sans l'aide des tribunaux.

Citoyen allemand, l'auteur est particulièrement familiarisé avec la pratique de la justice politique en Allemagne, non seulement sous le règne du nazisme, mais aussi, après la guerre, en République Démocratique Allemande. Ne sachant pas le russe, il n'a inclus dans son travail très substantiel aucun chapitre concernant la justice politique soviétique, mais parle beaucoup de l'Etat totalitaire en général et de son système de répression des oppositions politiques. Cela le dispense d'un examen détaillé de la pratique judiciaire soviétique, d'ailleurs bien connue pour avoir été déjà abondamment décrite. Ce que nous apprenons ici de la pratique judiciaire en République Démocratique Allemande est parfaitement suffisant pour nous permettre de juger le système judiciaire de n'importe quel pays au pouvoir des communistes.

Comme le montre Kirchheimer à bon droit, c'est sous Staline, à plus d'un titre, que l'asservissement de la justice à la répression des oppositions politiques atteignit son point de perfection. Mais la Yougoslavie aussi a connu de semblables procès, et ceux de la République Démocratique Allemande sont des modèles en matière de préparation d'une affaire où la sentence est fixée d'avance.

Au surplus, l'auteur n'a pas voulu rédiger un traité dirigé spécialement contre les régimes communistes. Il cite maintes fois les excès imputables aux oppositions religieuses et raciales en Afrique du Sud, en Algérie, en Espagne, en Allemagne, etc. Il entend montrer combien il est néfaste, moralement et politiquement, de ruiner l'autorité de la justice, en transformant un procès judiciaire en spectacle politique, en privant le juge d'une libre appréciation des preuves, en limitant le choix des moyens de défense.

L'auteur montre en outre que le juge, dans les procès politiques, est moins le « gardien de la loi » qu'un représentant loyaliste du pouvoir. Plus étroitement il est lié au pouvoir, plus fidèlement il représente les vues du groupe ou du parti dirigeant, et plus la sentence est prédéterminée (p. 176). Là où le sort de la majorité de la poulation est réglé par une minorité insignifiante, il ne peut y avoir, entre le juge et des individus en réalité dépourvus de droits, de relations déterminées par le principe de l'égalité de tous devant la justice (p. 210). Une justice de classe ne saurait être impartiale (p. 217).

Les remarques de notre auteur sur le rôle de la défense dans les procès politiques sont également très intéressantes.

L'avocat ne se trouve pas dans une situation qui l'oblige à prendre la défense de l'accusé comme le médecin apporte ses soins à tout malade. Le défenseur ne peut pas perdre de vue que tout ce qu'il dira en faveur de l'accusé laissera inévitablement l'impression qu'il est solidaire de son client. Lénine, ainsi que le montre Kirchheimer, recommandait aux défenseurs politiques de s'efforcer de détruire par le ridicule les arguments de l'accusation, en laissant à l'accusé le soin de défendre ses actes (p. 245).

Tout cela montre que le crime politique est une sorte particulière d'infraction. Les codes et la recherche théorique les traitent à part.

Le livre de Kirchheimer n'est pas à proprement parler une étude juridique, encore qu'elle puisse être très utile aux juristes.

Le mérite de l'auteur est d'avoir mis l'accent sur les doutes qui ne peuvent pas ne pas naître quant au caractère criminel d'actes qualifiés d'hostiles à l'Etat et poursuivis comme tels, mais qui, en réalité, ne sont que des manifestations de mécontentement à l'égard d'un régime. Est-ce un crime que d'agir en faveur d'un changement de régime, que lutter pour un droit nouveau, que de critiquer le gouvernement ? Où est la frontière entre l'opposition légale et cette « lutte pour le droit », que le célèbre juriste allemand Ihering considérait comme le facteur naturel de l'évolution du droit ? Telles sont les questions posées par Kirchheimer (p. 31 à 35) ou qui découlent des faits produits et éclairés par lui.

Si Kirchheimer connaissait la littérature juridique russe, il pourrait trouver dans les travaux des représentants de l'école psychologique de droit, chez Petrajitsky *(Théorie du droit et de la morale)* et chez Guins *(les Idées modernes dans le domaine du droit)* bien des points communs avec ses propres considérations sur le caractère « conditionné » des normes juridiques, sur les « époques de transition » et sur l'évolution des notions d'« intérêt » et de « volonté » du peuple. L'enseignement de l'école psychologique, qui montre comment se crée le droit « intuitif », en désaccord avec le droit « positif » en vigueur (Petrajitsky), et comment à partir d'une foule de convictions intuitives concordantes naît une nouvelle conscience juridique (Guins), trouve, à son tour, une confirmation dans les données de Kirchheimer, ainsi que dans ses généralisations. La nécessité urgente de réformes devient parfois si évidente que seule l'issue — le succès ou l'échec — de la lutte pour ces réformes peut, dit Kirchheimer, résoudre la question de savoir qui a raison et qui a tort (p. 240). Quand les infractions à la

loi deviennent trop fréquentes, le pouvoir ne peut plus les châtier toutes et ne poursuit plus que ceux qui se préparent à l'« insurrection ouverte » (p. 241).

Comment sortir des contradictions et des conflits d'opinion sur les voies bonnes ou mauvaises menant à la réforme de l'ordre existant, sur la nécessité ou la nocivité des projets et programmes proposés ? Pour cela, il suffit de confronter les régimes totalitaire et démocratique. Kirchheimer définit le premier comme un système où la libre émulation des idées et des forces sociales est frappée d'anathème, où une planification et une direction centralisées remplacent les associations libres, mises hors la loi (p. 295). Le droit se transforme en instrument du pouvoir et chaque individu doit conformer sa vie et son activité au plan imposé d'en haut.

Qu'est-ce que la loi, quelles sont les sources du droit ? En République Démocratique Allemande, dont le régime est cité par l'auteur comme modèle de système totalitaire, le pouvoir exécutif considère la loi inscrite dans la constitution et n'importe quelle circulaire administrative, n'importe quelle résolution des organismes dirigeants, n'importe quel discours d'un chef du régime, n'importe quel article paru dans l'organe officiel du Parti, voire n'importe quelle conférence explicitant quelque point important de la doctrine communiste comme également impératifs (p. 297). La légalité, nous dit l'auteur, représente, dans ces conditions, une combinaison de la loi et d'une intention. Le juge n'est qu'un fonctionnaire entre d'autres, et il doit, comme tous, suivre strictement à la fois les ordres et les « signaux « donnés d'en haut et montrant la direction politique.

Au contraire, un Etat fondé sur le droit se borne à contenir les oppositions dans des limites garantissant la sécurité et l'ordre. L'opposition bénéficie de la protection de la loi, mais par là même s'impose à elle la conscience qu'elle doit rester dans les limites de la loi. La constitution de la Cinquième République donne au président de la République le pouvoir de mettre le parti communiste hors la loi, mais de Gaulle n'a pas usé de ce droit. Le respect de la légalité par l'une des parties incite l'autre à rester elle aussi dans le cadre de la loi. Au contraire, les violences commises en Algérie et en France par l'O.A.S. ont provoqué une inévitable réaction de contre-terreur. La justice politique, dit Kirchheimer pour conclure, sert les intérêts de la politique, mais ce service peut prendre des formes diverses. En régime totalitaire, le juge, devant une affaire politique, cherche la décision désirée par le pouvoir, alors que le juge d'un Etat fondé sur le droit garde la liberté de ses moyens d'action et s'inspire non de ce qui est nécessaire au pouvoir à un moment donné, mais de ce qui peut rester une décision valable aussi pour l'avenir (p. 424).

Le problème des délits politiques est complexe, car la politique fait irruption dans le domaine de la jurisprudence chaque fois qu'une affaire touche la défense du régime existant et les pouvoirs qui le représentent. Kirchheimer a raison de joindre à son livre deux chapitres spéciaux et très substantiels qui traitent du droit d'asile, dont l'usage est si fréquent de nos jours, ainsi que du droit de grâce ou d'amnistie, qui sont, dans une certaine mesure, des compensations au système de répression des ennemis d'un régime existant. Mais il manque à son livre certains principes conducteurs *de lege ferenda* : il aurait pu souligner que ne peuvent demeurer impunis des crimes contre les lois protectrices de principes moraux essentiels, comme celles qui poursuivent le terrorisme et la trahison ; mais qu'une opposition qui n'a pas recours à la force ne peut, en aucun cas, être considérée comme un crime ; que le système du parti unique est la base du régime totalitaire antidémocratique, violant le droit du peuple d'exprimer librement sa volonté, et que, vu la situation internationale, aucun Etat ne

peut retrancher derrière sa « souveraineté » et prétendre échapper ainsi à l'action des organismes internationaux, quand il se rend coupable de terreur massive et de génocide dans la poursuite d'ennemis de classe, ou d'adversaires politiques, raciaux ou religieux.

G. Guins

CHARLES WARREN HOSTLER : *TÜRKEN UND SOWJETS*. Die historische Lage und die politische Bedeutung der Türken und der Türkvölker in der heutigen Welt. Alfred Metzner Verlag, Francfort-sur-le-Main, Berlin, 1960, 264 pp. et 5 cartes.

Parmi les travaux scientifiques récents se trouvent des études particulièrement intéressantes et précieuses, s'imposant à l'attention du public et de la critique. C'est sans aucun doute à cette catégorie qu'appartient le travail du chercheur américain Charles Warren Hostler, publié pour la première fois en anglais en 1957 à Londres (*Türkism and the Soviets, The Türks of the World and their Political Objectives*. Georges Allen, Ltd.) et l'on doit se féliciter de l'initiative de l'éditeur allemand à qui nous devons la traduction allemande qui fait l'objet du présent compte rendu.

Au cours des dernières dizaines d'années, la science mondiale s'est enrichie de nombreux travaux concernant les peuples türks et la situation de ceux qui vivent en Union Soviétique. Il suffit de rappeler les œuvres des savants turcs suivants : Khalil Inaltchik, Akhmet Temir, Baymir za Hayit, Abdullah Soïsal ; celles des savants occidentaux que sont G. Jäschke, B. Spuler, J. Benzing, G. von Stackelberg, N. Poppe, W. Dubrowski, A. Bennigsen et maints autres qui ont apporté leur contribution à l'étude du monde türk passé et présent. Cependant, la plupart des travaux récents en ce domaine sont consacrés à des problèmes ou à des secteurs particuliers du monde türk : à la Turquie proprement dite, au Turkestan, à l'Idel-Oural, au Caucase et à la Crimée ou encore à des questions historiques spéciales. Parmi les travaux relativement peu nombreux et qui embrassent des ensembles assez larges du monde turc, il faut accorder une attention particulière aux plus intéressantes études de G. von Mende : *Der nationale Kampf der Russlandtürken* (Berlin 1936), de Zeki Velidi Togan : *Bugünkü Türkili (Türkistan) ve yakın tarihi* (Istanbul 1942), et de R. Pipes : *The Formation of the Soviet Union. Communism and Nationalism. 1917-1923* (Cambridge, Massachusetts 1954). L'intérêt particulier du récent livre de Hostler consiste sans aucun doute en ceci qu'il s'efforce de présenter au lecteur un tableau large et complet du passé récent, de la situation actuelle et de la signification politique de tout le monde türk d'aujourd'hui. L'un des critiques de cette œuvre a eu raison de faire remarquer qu'il s'agit là de « la première et unique étude résumant l'ensemble de la situation » du monde considéré.

Le livre comprend cinq chapitres. Dans le chapitre introductif, l'auteur attire l'attention du lecteur sur l'importance mondiale du problème que soulève le monde türk, lequel occupe une surface immense, des rivages de la Méditerranée et de la moyenne Volga, à l'ouest, aux frontières de la Mongolie, à l'est, et fait, selon les propres termes de Hostler, l' « objet du grand litige géopolitique » de notre temps. Il est intéressant de faire remarquer que l'un des critiques anglais de l'œuvre de Hostler a souligné spécialement l'importance économique et stratégique de cet espace dans la politique mondiale actuelle. Dans le domaine politico-national, les moments les plus remarquables du problème pantürk furent, au XX^e^ siècle, la naissance et le développement de l'idée de türkisme, le mouvement de libération d'une Turquie nouvelle, nationale, avec à sa tête le grand Atatürk,

METAPHYSIK. By Emerich Coreth, S.J. Innsbruck: Tyrolia-Verlag, 1961. Pp. 690. Sfr. 33.

This is a brilliant attempt to re-establish metaphysics as the "science of being." Beginning with the scientific evidence already contained in the very capacity to ask what being is, the author handles with assurance the insights into this question contributed by modern philosophers from Kant to Husserl and Heidegger. Thus, though his thinking is basically scholastic in orientation, he seeks to incorporate into it the best efforts of "transcendental" thought. The result: a remarkable methodological rigor in reflecting on the evidence from beginning to end leads once more to the conclusion that metaphysics finds its ultimate foundation in the Being of God.

Fordham University. QUENTIN LAUER, S.J.

POLITICAL JUSTICE. The Use of Legal Procedure for Political Ends. By Otto Kirchheimer. Princeton, N. J.: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

When judicial authority is used to tip the scales in situations of political equilibrium, the concept of justice is found in the most ephemeral of its divisions. Traditional categories of commutative, distributive, social, and legal justice embody strict moral implications in man's societal life, but the purpose of the phenomenon which the author describes as political justice is pragmatic: the widening of the scope of man's political activity by enlisting the services of the courts in behalf of mainly political goals. The controversial Nuremberg trials and Israel's dramatization of a tragic era in Jewish history, uniquely staged by an Eichmann trial, mark the timeliness of this scholarly book.

The first of the book's three parts treats principally of the causes and methods of a state's legal protection against dissenters. The author presents the notorious "L'Affaire Caillaux," the treason charge levied against a French statesman by his political opponents because of his advocacy of a negotiated peace with the enemy in 1917. The trial of Archbishop Stepinac in Yugoslavia and the use of the courts to further the state policy of anti-Semitism in Nazi Germany or race superiority in South Africa are some of the other well-documented examples. We are reminded also of the criminal syndicalism laws of the 1930's in the United States which were used to counter incipient miners' unions. And of course, we have the Alger Hiss trial, wherein certain fragmentary acts of the defendant were brought to light in order to create an unfavorable image based upon his political and ideological beliefs.

In the second part of the book dealing with the *dramatis personae* of the phenomenon of political justice, the author points out the complexity of the judge's task of individualizing the norm in concrete case situations. For norms, we are told, are not meant for eternity, and those with which the judge must work are gauged to long-term community needs, individual circum-

stances, and "specific sociopolitical configurations of the age." One wonders if this is a jurisprudential concept somewhat similar to that of Jhering, based on a morality of interests; perhaps such a concept would be more at home within the corpus of doctrine attaching to the sociological school of jurisprudence identified in this country with Roscoe Pound.

The defendant in the political trial usually has considerations at stake far beyond that of a favorable court decision. Such considerations successfully promulgated are exemplified in the trial of Jesus before the Sanhedrin and in the classical trial of Socrates, while unsuccessful promulgation is evidenced in the recent failure of American Communists to win popular appeal through the Smith Act trials. We should not forget, however, that the bumpy road from the courtroom dock to national leadership is a well-traveled one: De Valera, Gandhi, Nehru, and countless Soviet revolutionaries are but a few who bear witness to this fact.

The difference between the responsibility involved for political-military failure and for inhuman conduct must be recognized in what the author terms the "trial by fiat of the successor regime." Such was the Nuremberg experience, and more. With all of its insufficiencies it was "the feeble beginning of trans-national control of the crime against the human condition." We note with the author that the charges preferred at Nuremberg for the most part were not charges of crimes against humanity, but were charges of war crimes, similar in many respects to other common crimes.

The final part of the book has to do with the legal devices of asylum and clemency by which the impact of political justice can be modified or even frustrated. Their names may differ over the years, but we have always with us the expatriate, the émigré, or the refugee.

In describing some of his specifications of justice it would seem that the author has assigned an enlarged meaning to the adjective "political." Nevertheless, these specifications provide valuable insights into the nebulous and neglected political aspect of jurisprudential study.

Weston College. FRANK B. HIGGINS, S.J.

We still want to believe that the world is making progress towards liberty, equality and fraternity. Recent events in Spain and Turkey (not to mention France amongst Western nations) somehow shake the firmness of this belief in steady progress: even in the Western world, the rulers seem to find the judges who deal to the opposition such regards as the rulers demand.

The use of legal procedure for political ends is described impartially, for different historical periods and different political systems, -- but not the less frighteningly, by Otto Kirchheimer*). That a professor on one of America's leading universities (Columbia), and Princeton University Press, should wish to acquaint the reader in the United States with the links between politics and legal procedure, might surprise non-American readers. But the United States, not less than older countries, have a long history of political killings and political justice: in a celebrated fight between Republicans and Democrats, Indiana refused to extradite the Republican candidate for Governor of Kentucky, charging the state of Kentucky (controlled by the Democrats) with political abuse of justice. But other states, within and without America, have not always paid as much attention to the right of asylum for today's political minority (who might be the judges of tomorrow).

The Jewish reader, and particularly the Israeli, cannot help being frightened by Kirchheimer's impartial and impassive record of the past, and particularly the recent past. We know very well how the National-Socialist regime succeeded in making the courts subservient to the terror machine; some of us even know that some of German judges tried consistently to oppose the terror: even the Reichsgericht succeeded to rule in favour of a Jewish doctor's claim, as late as December 1941.) But other countries' lugubre records are is less well known: Very few Israelis, now on holiday in Switzerland, knew that the Swiss government egged on the Nazis to institute procedures by which passports of German Jews were marked -- thus ~~xx~~, Jews in quest of asylum could be turned back at the frontier whilst "Aryan" cash-carrying ~~xxxxxx~~ tourists were very welcome to Swiss resorts. The National-Socialists, after all, had the example of Czar Nicholas who granted free pardons to the murderers of

Jews. Swiss practice created new precedents: the Russians perhaps ~~government might have~~ followed the Swiss example when ~~Stal~~ Stalin ordered the forcible return to Germany of Communist refugees (Margarete Buber-Neumann has described how this experience ~~which~~ enabled her to compare German with Russian concentration camps). Of course, later Switzerland and ~~Spa~~ Spain followed the Swedish example in Budapest when they distributed entry permits amongst Hungarian Jews, saving tens of thousands from the extermination camps; their action, as the Vatican representative in Budapest expressed the Pope's view at that time, with the most grave was not motivated "by a false sense of compassion".

Professor Kirchheimer, by reminding us of recent history, not only enables his Israeli readers to keep their memories intact (we are all intent on forgetting). ~~Let~~ His book might ~~also~~ serve as guide to the perplexed ~~statesman~~, when the right of asylum comes up again for discussion. It is customary now to see England as a decadent empire, unable to ~~defend~~ maintain its ~~established~~ record of the great defender of the oppressed. Yet, when the United States demanded the extradition of a German Jew, ~~from them~~, ~~who was convinced~~ convicted of radical views, the British magistrate refused to entertain the action. In the more recent extradition case, Justice Maccatta at least enabled the Jewish prisoner to apply to the courts in London (he had not been allowed to bring his case before the Jerusalem courts).

In this regard, Israel, and particularly its intelligentsia, does need a reminder: weak nations must rely on the very few established rights of minorities, ~~and particularly~~ chiefly amongst these by the right of asylum. Strangely enough, Israel took its cue from Swiss and Vichy practice rather than the United States or England: in the recent discussions, neither G. Eisler's case, nor Medina v. Hartmann, 260 F 2d 569, was quoted by the government. ~~Nor was it~~ No one recalled that the United States refused extradition of the Croat Minister of the Interior, responsible ~~under Ante Pavelic~~, for the mass murder of Jews and ~~other min-~~ Serbs alike: the political character of these murders was affirmed, and the "statesman" ~~man~~ responsible protected against

the Jugoslav government;Karadzole v. Artucovic, 335U.S. 393

Kirchheimer's treatise, ~~however~~, was written before the Soblen case shook liberals everywhere ~~who had seen the Israeli government as their natural ally~~. Still,some of his references to Israel are worth remembering: Professor Kirchheimer, writing before the Eichmann trial ,is openly critical ~~of Israel in the Eichmann case~~:" a conscious effort to use the trial form for purposes of internal mobilization","an effort to enlarge the effectiveness of political action by resort to the courts".A German request for Eichmann's extradition(which would have saved his life) would have "been amply justified on legal and m o r a l grounds". ~~Of course,~~ The views of ~~a leading jurist~~ (American professors might be passed over by ~~parochial spirits~~ practical men but; we should not forget ~~that~~ we many ~~other~~ Jewish voices who were highly critical of Israel in this outstanding case;Hannah Arendt is only one example for the attitude of ~~the~~ progressive, ~~forces~~. The image of the young state in the eyes of the intelligentsia abroad is ~~xxxx~~ of some importance(possibly as important as its image in the eyes of foreign bankers).

POLITICAL JUSTICE.The use of ~~xxxxxxxx~~ legal procedure for p political ends. By Otto KIRCHHEIMER. Princeton University Press.

Political Justice: The Use of Legal Procedure for Political Ends. By Otto Kirchheimer. Princeton, New Jersey: Princeton University Press, 1961. Pp. 452. $8.50.

This book is a definitive study of the use of the legal process by the state against individuals in situations which entail a high degree of values of a political character. "Something is called political if it is thought to relate in a particularly intensive way to the interests of the community."[1] This reviewer has put the meaning of the term political as follows: "As the intensity of attachment of the actors in a situation of conflict to the competing values involved therein increases and the number of actors in the society who are involved in such value conflict increases, the likelihood will increase of the characterization of the situation as one of a political, rather than a legal, nature . . . When conflict in a society involves competing group demands based on incompatible values held by such groups, its resolution is typically the task of the political process and institutions, rather than the legal."[2] In the view of Justice Jackson, decisions which are "confided to the political departments of the government . . . are delicate, complex, and involve large elements of prophecy . . . and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."[3]

The political trial involves the prosecution by the state of one or more individuals for the commission of criminal offenses. The offenses may be either common crimes or criminal acts directed against the state, such as treason and sedition. Modern security legislation seeks "to protect the political order from any intellectual, propagandist, and especially organizing activity directed toward revolution . . . [T]he area of

genuine political criticism is overhung by clouds which hide the light separating fact, fancy and wish. It is not easy to disentangle the components and isolate the maliciously slanderous contribution. Many a recent statute has ignored the difficulty, subjecting legitimate criticism to punitive provisions."[4]

The political trial, as an instrument for achieving and preserving political authority, tears an incident loose from the historical context in which it was intervined and turns the "strongest spotlights on it, to disclose its minutest detail . . . The past is reconstructed for the sake of the future as a possible weapon in the battle for political domination." The trial requires a "segment of history" to be reconstructed. Although the past segment is part of "a still present conflict," the judge is allowed "to disregard its present elements and treat it exclusively as a past event." But any trial entails risk that its reconstruction of a past event through the testimony of witnesses will not take place as anticipated. In the political trial, it is imperative that witnesses reenact their predetermined roles with scrupulous fidelity, otherwise the political message which the trial was intended to communicate will be lost.[5]

The use of the legal process to suppress groups who dissent in principle from an established regime "has been directed so far against small groups of little importance in domestic affairs . . . Open repression . . . is bound to miss the target and repel friends when the persecuted group assumes the stature of a mass movement, controlling a large segment (say, more than twenty per cent) of the popular vote. . . Even if a combination of social and economic pressure and police operations were enough to enforce the ban, there might be enough resistance to throw the judicial machinery out of gear and cancel what is the benefit of limited repression, the chance to preserve in fact the legal process and the framework of democratic institutions."[6]

The degree of concensus of a society upon a single value system or, put in opposing terms, the heterogeneity of a society in terms of its sharing of values and the priority accorded values, is a factor of first importance in the viability of its legal system. The author develops this principle as follows: "The meaning of legal consciousness in a heterogeneous society thus offers special problems. If no informal consensus exists on fundamental community issues, the judges cannot play their traditional role in realizing the community value structure and pointing it up in relation to specific issues . . . Impartiality presupposes a commonly accepted starting proposition. If as his point of departure the judge uses propositions which are emphatically rejected by substantial elements in the community, he will not be able to rely on the presumption of obedience owed to his office, even if he can show that he has adhered with some consistency to his initial proposition."7

Dissent from the politics of an industrial society will reject the ethic of conformity and embrace instead loyalty to a group or cause: "The politics of an industrial society have often become a rational interplay of interest organizations whose outward form is a gigantic and permanent popularity contest. Members of the legal profession functioning as custodians of the political game must themselves conform to its rules and precepts. Why, then, should anyone else be privileged to reject the prevailing political framework and insist on recreating politics in the image of a community resting on loyalty to group or cause rather than on rational, civilized, if uninspiring, calculation of profit and loss?"

The lawyer's task in a political trial taking place in a mechanized, standardized, conformist society is to use "creative ingenuity . . . in whipping diffuse elements of a given situation into convincing enough shape

to obtain a favorable reaction for his client."[9] A functionary of the Czech Lawyers' Organization pointed to the dichotomy of the lawyer's devotion to the interest of his client and public interest, which is involved in a political trial, as follows: "If the lawyer wants to keep to the principle that he has to preserve the interest of his clients in conformity with the interests of society and the principle of objective truth, he has to analyze clearly every case. He has to conform to the objective truth and the interests of society. For this reason we use the term 'justified interest of the client,' and only those interests may be taken care of by the lawyer."[10] (Italics supplied.)

The author examines the history of the manner in which political trials have been used to protect regimes from subversion and overthrow. The principles governing the use of political trials as a support for authority are elucidated and developed through illustrative examples. The requisite characteristics of the roles of the defendant and his lawyer, together with the prosecutor and the judge, are thoroughly explored. There are many perceptive statements about the nature of the judicial process and the task of the judge in trials of this character.

One chapter is devoted to the operation of the judicial process in societies characterized by "democratic centralism," in which the judiciary became integrated with the political institutions. In such societies, the judiciary becomes an instrument for attaining the changing political objectives of the state. "The essence of socialist legality, then, is guaranteeing that orders and signals are unfailingly observed at all subordinate levels. . . . When policies and official interpretation change, legality attaches to the new task at hand. Under no condition is it called upon to mediate between today's objectives of the sovereign and yesterday's expectations of the subject."[11]

The Nuremberg trials are explored as an aspect of trials by successor regimes. They are termed "the most important 'successor' trial in modern history." With respect to the crime against peace charge, the author states: "Had the noble purpose of the crime against peace charge succeeded, had it helped to lay a foundation for a new world order, the uncertain juridical foundation of the charge would now be overlooked and the enterprise praised as the rock on which the withdrawal of the states' rights to conduct aggressive warfare came to rest. As the coalition pursuing the Nuremberg enterprise broke up before the ink on the Nuremberg judgment had time to dry, the dissensions among the wartime partners threw a shadow over the whole affair."[12]

With regard to the crimes against humanity charge, the author concludes: "The newly coined crimes against humanity concept (Article 6c of the charter) corresponds to a deeply felt concern over the social realities of our age: the advent of policies intent on and leading to debasing or blotting out the existence of whole nations or races. But if the social and political mechanism employed in such cases is unfortunately very clear, the legal formulae to cover and repress such actions remain problematic. In the absence of a world authority to establish the boundary line between atrocity beyond the pale and legitimate policy reserved for the individual state, the French government and its Algerian foes, the South African government and the representatives of the downtrodden negro and colored population, not to mention the Hungarian regime and its adversaries and victims, might continue to have a very different viewpoint on the meaning of the concept."[13]

The final appraisal of Nuremberg is that: "The concrete condition under which the Nuremberg litigation arose and the too inclusive scope of the indictment may make it difficult for us to separate the circumstantial elements which it shares with all other successor trials from its own

lasting contribution: that it defined where the realm of politics ends or, rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity."[14]

The concluding portion of the book is entitled "Political Justice Modified: Asylum and Clemency." It embodies a "search for rational elements in asylum and clemency practice."[15]

This review has summarized the highlights of the author's thesis to demonstrate the thoughtful, analytical manner in which data of political trials are employed to develop in a creative way significant principles and propositions in political and legal theory. The literature of law and jurisprudence has only episodically and tangentially dealt with the problem of the political trial, which the author investigates with such thoroughness. This study focusses directly upon the principal aspects of the problem and is a most important contribution.

Kenneth S. Carlston

Footnotes

1. P. 26. A footnote referring to a page number and with no other reference will refer to a page of the text under review.
2. K. S. Carlston, Law and Organization in World Society, Ch. VII (to be published by the University of Illinois Press, Urbana, 1962).
3. Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U. S. 103, 111 (1948).
4. Pp. 41, 43.
5. Pp. 110-112.
6. Pp. 159, 160.
7. P. 215.
8. P. 238.
9. P. 243.
10. P. 244.
11. P. 298.
12. Pp. 323, 324.
13. P. 326.
14. P. 341.
15. P. 349.

probably explained (though not necessarily justified) by the fact that its statutes can be found in any reasonably equipped law library. Dr. Aufricht, it is true, suggests[2] that the laws have been selected according to age (the United Kingdom represents the oldest; Ceylon, the Philippines and others represent the most recent type), breadth or precision of language, and levels of economic development. Yet one cannot help feeling that had such been the sole criteria (if the word may be used to indicate concepts of the utmost vagueness), some countries would have fared differently. In these circumstances it only remains to hope that Dr. Aufricht will in due course complete his undertaking by the publication of a second volume.

*F. A. Mann**

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHEIMER. Princeton: Princeton University Press. 1961. Pp. xxi, 452. $7.50.

We lawyers too often regard the law as a mechanic regards an automobile: we confine our attention to an understanding of its elements and to the development of skills necessary to make it work. We learn rules and principles of torts and corporate law, of crimes and anti-trust; we draft and negotiate, plead and litigate.

Like mechanics, however, too many of us neglect those facets of the legal institution which lie outside our special interest and skill. The automobile is, to be sure, a machine, and the mechanic's function is to see that it operates properly. But the automobile is also a social artifact, an economic product, an historical incident and an object of aesthetic judgment. Likewise, our law is more than a system of legal rights and duties which is studied and manipulated by its mechanics. It is also, among other things, a mechanism for the distribution of wealth, an embodiment of a system of morality, an arena for the resolution of individual and social conflict and a vehicle or medium of political action.

Professor Kirchheimer's book is directed at this latter facet of law, at law as an instrument of politics. His combination of political acumen, historical insight, breadth of culture and legal sophistication should not only awaken the lawyer to his parochialism but should also direct the social scientist to a new interest in the law. How many historians, how many students of the family as a social institution, or how many economists are aware of the fund of material relevant to their science which is available to one who has some mastery of legal research? Legal materials are, unfortunately, beyond the competence of too many scholars and scientists; this, among other reasons, explains why a book like "Political Justice" is a rather unusual achievement.

The purpose of the book is to describe the ways in which political ends are achieved by resort to the processes of law, especially by resort to the courts. Political justice is justice or legal process designed or used for the resolution of political conflict or the fulfillment of other political goals. In the simplest sense, it is the use of legal process to discredit a political opponent, for instance,

[2] P. xvii.

* Dr. Jur. (Berlin); LL.D. (London); Honorary Professor, University of Bonn; Solicitor in London.

to remove him from political life by having him convicted of a crime. In more complicated instances, it involves the creation or sustenance of a public opinion favorable to a particular political goal by resort to the courts: an Eichmann trial designed, among other purposes, to win sympathy and moral support for a beleaguered state or a Hiss trial intended to awaken a nation to a neglected peril. (Or, was the latter's purpose, perhaps, to regain public confidence in the ability of a party in power to deal with a threat which the opposition party claimed it could not handle?)

In order to achieve an understanding of the political role of the judicial process, Professor Kirchheimer combines narration and speculation. He offers copious illustrations and then attempts to generalize from them. He examines the Goebbel assassination in Kentucky, the libel suit instituted by President Ebert in Germany, the Caillaux case in France and the Nuremberg trial. He has a fine capacity to give "the feel" of a trial and its involved historical and political roots in short scope. Moreover, once having narrated, he reaches out for general insights, for explanations of why there was a resort to the courts and what political role the litigants, the judge and counsel played. Sometimes the reach of his theory seems to go further than it should and he is overly elaborate and abstract. On the whole, however, except for a tendency towards jargon and scientism, the generalizations which Professor Kirchheimer offers seem sound and fruitful.

I wonder, however, whether the book goes as far as it should. Is there not a sense in which every law suit is political, a fulfillment of a political goal? Principles of the law of torts, for example, embody a resolution of conflicts not only between the litigants in individual cases, but also between various economic and social interests. The resolution of just such conflicts lies at the very heart of the legal process. By concentrating attention solely on political trials, that is those involving political parties and political figures, Professor Kirchheimer has perhaps neglected the most pervasive sense in which justice is political, the sense which Hans Kelsen intends when he speaks of the identity of the Law and the State.

A lawyer will not learn to plead or try a case within these pages. He will escape from the narrow confines of his own province into adjoining territory, however, and this may be more important.

*Edward J. Bloustein**

International Claims: Their Adjudication by National Commissions. By RICHARD B. LILLICH. Syracuse: Syracuse University Press. 1962. Pp. xiv, 140. $5.00.

Many studies have been made of the organization and work of international mixed claims commissions to which states have submitted claims growing out of injuries to their nationals. Much less attention has been paid to national commissions. The latter are set up under the authority of a single state to pass on claims of its nationals against another state which had been settled between the two states by an agreement to pay a lump sum, or which the claimant

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Reprinted for private circulation from
THE UNIVERSITY OF CHICAGO LAW REVIEW
Vol. 30, No. 1, Autumn 1962

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

What is Political Justice? In a sense all administration of justice, criminal and civil, is political, as it serves to maintain and at times to change, the social and political order of society. Kirchheimer deals with political justice in its more specific sense—the use of the law and the courts directly to influence the struggle for political power. Even in this narrower sense the term refers to a wide variety of phenomena, ranging from the judicial prosecution of the alleged revolutionary or traitor to the use of the courts by the political opponent who forces a member of the governing group into a defamation suit. This variety of forms in which political justice can appear is vividly illustrated by the author in the opening chapter of his book, in which he presents a concise historical survey and a detailed description of some typical political cases of recent times. The use of an accusation of common crime to discredit or destroy a political opponent is illustrated by the attempt of the Kentucky Democrats in the 1890's to wrest the governorship from the Republicans by preferring a specious murder charge against the Republican leaders. The story of this long forgotten, but by no means atypical, episode of American politics is instructive as well as thrilling. The equally specious, but successful, attempt of Clemenceau and Poincaré, through a treason charge to prevent Caillaux from attaining political power during World War I, and from using it to bring about a compromise peace, stands for what may be called political justice in its purest form. How a regime can be undermined by forcing a member of the governing group to defend himself against libelous charges before a judiciary sympathetic to the libellant's cause is demonstrated by the case of Friedrich Ebert, first President of the German Republic after the collapse of the monarchy.

While trial can thus serve as a weapon of attack, it is more frequently a weapon to defend an existing regime or government against its opponents. Political justice is a typical weapon of what Kirchheimer calls "state protec-

tion," meaning the protection of the regime or government in power. It is not the only weapon. A government may dispose, and often enough has done so, of its real, suspected or manufactured enemies without interposition of the judiciary. Administrative arrest and protective custody in a concentration camp are but illustrations from our own times. They have been used not only by fascist, national-socialist or communist regimes, but during World War II by Great Britain and the United States.

Observing political justice as a means of state protection leads Kirchheimer into a discussion of state protection in general, especially the dilemma that presents itself to the modern liberal-constitutional state where it is, or believes itself to be, in serious danger from an "opposition of principle," especially by opponents of the very bases of democracy, constitutionalism and individual liberty. Such enemies, in our days fascist and communist, want to make use of those very liberties of democracy which they are bent to destroy. How far can a democratic state go in its efforts to protect itself against such enemies without destroying its own foundations? How can state protection be squared with freedom of speech? What Kirchheimer has to say on this disturbing problem stands out among the mass of recent writing. Here, as in all other parts of his book, Kirchheimer draws on vast material taken from many parts of the world. The radical measures of the Federal Republic of Germany, finding itself directly confronted with efforts of communist penetration from East Germany, are contrasted with the cavalier attitude of Great Britain, believing itself to be immune. The vacillating, and at times frantic, American outbursts are shown to be due less to real danger than to politicians' attempts to ride a probably overestimated wave of popular fear and insecurity. Kirchheimer believes that at least some of the American advocates of radical measures may have felt that the harshness of their legislative proposals would be softened, or even declared unconstitutional, by the courts. To some extent this expectation has indeed been borne out, especially through the attitude taken by the United States Supreme Court in *Yates v. United States*.[1] That case has not been the last word in the political struggle about anti-subversive legislation. In later cases the Supreme Court itself has taken a more rigid approach, and local courts have frequently tended to lean in that direction.

Reviewing the broad scale of attempted state protection in the past and present, Kirchheimer reaches the conclusion that most of the measures are unnecessary where the opponents are insignificant, and that they are, in the long run, ineffective against an enemy representing the majority of the people struggling against a governing minority regime or a colonial power. In such generality this judgment appears too broad. It applies only to liberal constitutional regimes that have opened themselves to democratic ideology and lost faith in the justifications of their own rule. In our days such softening has gone so far as to result in the voluntary abdication of colonial rule. But where

[1] 354 U.S. 298 (1957).

there is a strong will to maintain power, minority regimes have been able to survive attacks from within as long as they have not been accompanied by defeat by the external enemy. The Czarist regime of Russia even managed to survive the defeat by Japan in 1905; it did not fall until the total defeat by Germany in 1917. Austria-Hungary survived all attacks by Czech, Yugoslav and Italian nationalists until the defeat in World War II. If, along with Kirchheimer, one regards pre-World War I Germany also as a country where a majority of the people was lorded over by a minority, it might be added as another illustration. However, the German example tends to indicate that the dichotomy, minority-majority, may be too simple. Not even the Social-Democratic Party which, as a matter of fact, never achieved a majority vote, constituted in its totality an opposition of principle. A government may well be drawn from a minority of the people and the majority may be content with, or at least acquiesce in, that situation. The futility of the half-hearted German attempt of the 1880's to suppress the Social-Democratic Party can indeed be used as a prime example of the problematic relationship between liberal constitutionalism and efforts at state protection. The German case does not constitute an example of the futility of vigorously attempted state protection against a popular majority. Neither was the majority opposed to the existing system, nor did that system ever undertake a full-fledged effort at determined suppression of even its declared enemies. Such an effort, if it had ever been undertaken, might well have run into trouble not only because it would have been contrary to the political climate of liberalism, but also because it could hardly have expected the full co-operation of the judiciary, which, as shown by Kirchheimer's own illustrations, was little inclined to harshness against such leaders of opposition as Bebel and Liebknecht.

Neither in Germany nor in the United States or other non-totalitarian countries have the courts corresponded to that communist over-simplification in which they appear as mechanical tools of the government—both government and courts simply constituting weapons of the ruling class in its struggle to keep down the exploited class. Neither, of course, have the courts been the never-flagging champions of individual freedom against governmental suppression, as they have occasionally appeared in Anglo-American oratory. Reality is more complex. Its sociological analysis by Kirchheimer is penetrating. Why do governments resort to courts at all? Why do they run the risk of being rebuffed by the courts and the danger of the political trial being used by the accused and his group as a public forum of the potentially highest efficiency?

These questions are answered by Kirchheimer in a searching analysis of the role of courts not only in political trials but in society in general. Obviously influenced by Max Weber, Kirchheimer finds the key in the deep human need for justification of the use of power. In order to be accepted, and thus to be stable, power must be felt to be "legitimate," *i.e.*, to correspond to postulates

accepted as self-evident. In our age, in which the exercise of power, in order to be accepted as legitimate, must be demanded by, or at least correspond to, reason, the reasonableness of the exercise of governmental power must be visibly demonstrated. This task of legitimizing in individual cases the exercise of governmental power, especially when it is directed against an alleged enemy, falls to the courts; the judges are the legitimizers of the exercise of governmental power. This insight proves itself a veritable key to the clarification of the problematic role of the judiciary in the political fabric.

Courts cannot serve as legitimizers of governmental power unless they can follow their own judgment independent of the views of the government. Here then lies the root of the democratic postulate of an independent judiciary. But, on the other hand, no state could survive a decided hostility of its judiciary against its government. A dramatic illustration of such a case is afforded by the German Weimar Republic. Hence the problem of finding the right balance between judicial independence and judicial obedience to the law. No hard and fast solution can be stated. The answer must depend on varying circumstances of time and place. How great the variations have been in the measure of success, and how manifold are the available means of formal and informal nature, is extensively shown by Kirchheimer. Modes of judicial appointment, tenure, appeals, administrative controls, personal background, relations to the public, both in general respect and in special relation to the political case, all come under scrutiny. The inquiry is extended to the role and position of the other actors in the judicial drama: the prosecutor, the attorney and the accused. For the accused the political trial can present a much desired opportunity to publicize, dramatize and propagandize his cause and thus to defeat the very enemy by whom he is prosecuted. But promotion of the cause may be fatal to him. Shall he save his own skin by turning informer or traitor to the cause? The dramatic dilemma is illustrated by numerous contemporary cases as well as by the two most momentous political trials of our history, those of Jesus and Socrates.

What are the peculiar tasks of defense counsel in the various types of political trial? Is it his first task to serve his client, or is he to promote the cause? The two tasks can be incompatible.

What, furthermore, is the role of the prosecution? How is the prosecutor's position to be organized if it is simultaneously to serve the government and not to compromise the people's confidence in the administration of justice? What are the motivations for the decision of whether or not to prosecute, and, in the affirmative situation, of how to "dress up" the case?

All these problems are discussed on the basis of a large amount of material taken from constitutional countries such as the United States, Germany, Switzerland, France, Great Britain and South Africa. But how do the problems present themselves in a totalitarian country? The German Democratic Republic (*i.e.*, East Germany) serves as a richly documented illustration of the

several techniques—formal and informal, crude and subtle—for the achievement of a situation in which the courts, like all other organs of state and party, are to function as reliable executive organs of an all-powerful regime bent upon remolding an entire people in accordance with an ideology regarded as ultimate truth. This fascinating description is followed by a survey of turns in Soviet theory on revolutionary legality, which, however, does not extend to those latest tendencies which may conceivably foreshadow a considerable intrusion of lay elements into the administration of Soviet justice and, perhaps, a growth of judicial independence.

A chapter of some fifty pages is devoted to "trial by fiat of the successor regime," amply illustrated by cases from widely diverse places and periods. The trial of representatives of the defeated by the victorious regime appears to be a common, and probably inevitable, phenomenon. Kirchheimer uses the case to explain the essential difference between the trial and the action which for propaganda purposes is called a trial but partakes more of the nature of a spectacle with prearranged results. But even in such administration of justice, gradations exist. In the courts-martial of the Vichy militia and the people's tribunals of the first liberation days, enemies, whose fate had been settled in advance, were butchered. The liberation type of *cour de justice*, with all its prejudices, allowed for some primitive rights of defense. The elaborate military commission set up by the United States for the trial of such Japanese "war criminals" as General Yamashita is said to constitute a marginal case. The Nuremberg trial before the International Military Tribunal is regarded as a true rather than a merely simulated trial. The Nuremberg case is extensively discussed, but, in contrast to the general character of Kirchheimer's inquiry, the refutation of the critics moves more along legalistic than political lines. Whether Nuremberg has produced, as Kirchheimer hopes, the positive result of a lasting condemnation of the use of inhuman practice in the political struggle may well be doubted. As pointed out by the author himself, the Nuremberg indictment was directed primarily against the National-Socialists' attempt to subjugate Europe by force of arms, and only incidentally against the practices used in the pursuit of this aim. Inhuman acts unconnected with the war were expressly excluded by the Tribunal from its scope of jurisdiction. More convincing, on the other hand, are Kirchheimer's arguments against the proposals to call in neutral judges in the condemnation of the National-Socialist rulers of Germany by their Allied successors, or to leave their condemnation to German courts.

In the chapter following, Kirchheimer investigates the role played in political justice by the corrective institutions of asylum and mercy. Asylum signifies the limitations imposed on political power by the limits of its territorial spheres. What are the considerations motivating a government to grant or to refuse asylum? What were the policies of the several nations in the nineteenth century, when the asylum seeker was typically an individual? What are

they today when the search for asylum has come to be the concern of vast groups of persons persecuted not only on grounds of political creed or activity but on grounds of nationality, race or social origin?

What, finally, are the complex and widely varying motives for granting or denying mercy to individual victims of political justice, or amnesty to entire groups? The comparison of Lincoln's practices with those of contemporary American administrations is as fascinating as the analysis of attitudes of Shakespearian characters, of Tudor and Bourbon kings, or of successive French and German regimes.

In summing up Kirchheimer returns to the comparison of political justice in constitutional and totalitarian regimes. In the former the existence of a "judicial space" is essential if the "detour" of the resort to trial is to fulfill its function of legitimating the governmental prosecution of the political foe. Only if the courts are left a space of freedom to exercise their own, though perhaps narrowly defined, judgment can political justice be expected to achieve its assigned end. There must be some risk of divergency between government and court, and thus some risk of the trial being used by the accused as a forum for effective advocacy of his cause. Where no such judicial space is left, the political trial can serve only the different functions of a potentially highly effective means of a totalitarian government to educate the populace along the ways desired. Whatever the regime, political justice "is bound to remain an eternal detour, necessary and grotesque, beneficial and monstrous."[2]

This final judgment expresses the well-balanced nature of Kirchheimer's investigation of a topic that easily provokes partisan approach. Kirchheimer leaves no doubt about his own convictions as those of a democratic, liberal constitutionalist. But through his comprehensive knowledge of history he is familiar with the complexity and inevitability of the problem. He pursues it not as the pleader of a cause but as a scholar in search of knowledge and understanding.

Kirchheimer is a political scientist and a sociologist. He looks at the phenomenon of political justice from this outside point of view rather than from the inside position of the lawyer.[3] It is exactly this approach that makes his work fascinating and important for the lawyer. The impact of the inquiry is due not the least to the comprehensive scope of the author's material. Political justice has been treated in a flood of writing, especially in recent years when it has become such a widespread and disquieting phenomenon. The number of American discussions of American cases, practices and problems has been legion. Nowhere else can the reader find such a wealth of material as in Kirchheimer's book. Consequently, the approach is from a higher level; phenomena and problems of one country are reflected in those of another. Thus new light is thrown upon the familiar phenomenon. The inquiry cuts down

[2] P. 430.

[3] The fact that the author is not a lawyer has found expression in his unorthodox and at times annoying mode of citing cases, American and foreign.

to fundamentals. The book constitutes a high achievement of comparative law as well as of jurisprudence. Law teachers might well consider its use as a base for discussion in seminars or courses on jurisprudence. For one striving at clarifying his thoughts about the problem of how to defend our social and political system against its enemies, without in the effort undermining its very foundations, Kirchheimer's book is, I dare say, indispensable. To the judge, attorney, or prosecutor involved in a political case, it will serve as a useful practical guide.

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KIRCHHEIMER, Otto. Political Justice: The Use of Legal Procedure for Political Ends. Princeton: Princeton University Press. 1961. xiv & 452 pp. $8.50.

"The aim of political justice is to enlarge the area of political action by enlisting the services of courts in behalf of political goals." Political recourse to the courts occurs in a variety of circumstances. It involves, of course, a distortion of the judicial process; at the same time, the characteristics of that process supply conditions, some advantageous, some disadvantageous, to the pursuit of the political goal.

It would be hard to conceive a literary project more ambitious--or more forbidding--than an analytical study of political justice. There is needed first of all the mastery of a great mass of historical detail, for the study must rest on empirical data; and these data must be evaluated. The author must be familiar with all the legal systems involved in his data. But these are only the beginning. The events must be oriented in a historical scheme; they must also be made to yield a categorical analysis which exposes the necessities, the implications, and the consequences of political justice. Imagination and a high degree of creativity are required.

All these conditions are met in the book under review. Some hundreds of cases contribute at one point or another to the discussion; several receive extended consideration. They simultaneously underpin and illuminate the historical and analytical treatments.

For most of human history the legal offense of disrespect for authority--the crimen laesae majestatis--has been punished as a matter of course. But during the nineteenth century, in western Europe and the United States, where the ideal of constitutionalism had taken root, this "system of

state protection" was "hesitant and conscience-stricken." Since the First World War, however, it has been restored to full vigor. The "crime of social dissolution," to adopt the expressive Mexican term, has been introduced almost everywhere. The French, German, and American codes are very elaborate; only Great Britain and some of the Commonwealth nations have adhered to the nineteenth century tradition.

In part social factors account for these changes. The outlook of the nineteenth century was that of the middle class. The middle ~~xxx~~ class had made its gains through opposition to government, and still identified itself with dissent. Moreover, the middle class inherited the optimism, the rationalism, and the attachment to certainty of the Enlightenment. For the first time there was a public opinion hostile to political justice. But today, in mass society, public opinion is uninformed, uncritical, and irrational; it applauds political prosecutions with enjoyment of thespectacle heightened by moral indignation at the victim.

Political factors also played a part. The nineteenth century saw the apogee of the national state. The tendency was toward indulgence of internal proposals of change; traffic with a foreign enemy was "the deadliest of all sins." But international communications have recast value systems in the twentieth century: economic interest groups, Fascism, and Communism have their various ways deprived the state of its monopoly of loyalty. These very developments have produced more violent assertions of state patriotism on the part of the popular masses. The upshot has been the enactment of penal legislation which identifies the ideological crime of social discontment with aid to a foreign enemy. The imprecision of the concept of "subversion" makes possible the conflation of the two offenses, and its vagueness makes the word more sinister and menacing.

But these illuminating historical insights are a side-issue. The

principal concerns of the book are to establish types of political justice and to examine the constituent elements of the political trial. The most obvious case of political justice is the bill of attainder, the outlawry of a dissident group. When a ruling minority undertakes to destroy popular organizations, there is usually no ulterior purpose; the goal is simply repression of opposition. Execution of the political policy collides at points with the legal order, which the government is unwilling to scrap altogether; even the opponents of the racial laws of South Africa have found some shelter behind the structural beams which are necessary to support any legal system. But most contemporary acts of repression--the American anti-Communist legislation, and the suppression of the Socialist Reich party and the Communist party in West Germany are considered in some detail--are not intended to protect the regime from any real threat. The American legislation resulted from a competition in demagoguery. The Socialist Reich party was suppressed for no other reason than its insolent behavior. The suppression of the Communist party by the German Constitutional Court was principally intended to buttress the foreign policy of the government.

Other forms of political justice do not involve the proscription of a group by name. Statutes of a more conventional sort, prohibiting one or another action, speech, or opinion are passed; or the defendant is charged with an offense drawn from the ordinary criminal law. Civil actions, such as libel suits, may also serve political ends. A special class of actions is the trial of a predecessor by a successor regime, as in the Nuremberg trials, which are considered at length. In most cases political justice aims at public opinion rather than at the ostensible victim: the purpose is to vindicate a regime or a candidate or a policy by establishing an image of the opponent as an enemy of the common good.

Thus the political trial undertakes to recast history into a desired pattern. By focusing on a single event, to which are attached both decisveness and culpability, it radically distorts the subject; but of course distortion is the purpose. The political trial is a morality play. The characters are the judge, the jury, the lawyers, informers, and the parties. Usually the state is one of the parties; and it also supplies the stage directions. In interpreting their roles the actors enjoy a certain latitude. How great this is, and how it is used, depend upon many circumstances; these the author explores and illustrates.

A chapter is devoted to asylum, and another to clemency. These arise in such widely varying situdations, and discretion plays so large a part, that systematization cannot proceed very far.

It is clear that Dr. Kirchheimer does not attribute entire objectivity and certitude to the judicial process at its best. His approach is a blood-chilling legal realism. Consequently he takes for granted both the inevitability and teh injustice of political trials. They have, however, this merit: they are a part of the struggle for political power, and without them the struggle would continue in a less orderly way.

Judicial process has as its objective the solution of problems in terms of truth and reason. When the magnet of power enters the field, must the needle invariably swing to the new pole? Political Justice recounts a few cases in which this did not occur, but these must be regarded as exceptions to the rule. The dispassionate accuracy and the profundity of the book make the conclusion the more depressing.

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Reprinted for private circulation from
THE UNIVERSITY OF CHICAGO LAW REVIEW
Vol. 30, No. 1, Autumn 1962

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

What is Political Justice? In a sense all administration of justice, criminal and civil, is political, as it serves to maintain and at times to change, the social and political order of society. Kirchheimer deals with political justice in its more specific sense—the use of the law and the courts directly to influence the struggle for political power. Even in this narrower sense the term refers to a wide variety of phenomena, ranging from the judicial prosecution of the alleged revolutionary or traitor to the use of the courts by the political opponent who forces a member of the governing group into a defamation suit. This variety of forms in which political justice can appear is vividly illustrated by the author in the opening chapter of his book, in which he presents a concise historical survey and a detailed description of some typical political cases of recent times. The use of an accusation of common crime to discredit or destroy a political opponent is illustrated by the attempt of the Kentucky Democrats in the 1890's to wrest the governorship from the Republicans by preferring a specious murder charge against the Republican leaders. The story of this long forgotten, but by no means atypical, episode of American politics is instructive as well as thrilling. The equally specious, but successful, attempt of Clemenceau and Poincaré, through a treason charge to prevent Caillaux from attaining political power during World War I, and from using it to bring about a compromise peace, stands for what may be called political justice in its purest form. How a regime can be undermined by forcing a member of the governing group to defend himself against libelous charges before a judiciary sympathetic to the libellant's cause is demonstrated by the case of Friedrich Ebert, first President of the German Republic after the collapse of the monarchy.

While trial can thus serve as a weapon of attack, it is more frequently a weapon to defend an existing regime or government against its opponents. Political justice is a typical weapon of what Kirchheimer calls "state protec-

tion," meaning the protection of the regime or government in power. It is not the only weapon. A government may dispose, and often enough has done so, of its real, suspected or manufactured enemies without interposition of the judiciary. Administrative arrest and protective custody in a concentration camp are but illustrations from our own times. They have been used not only by fascist, national-socialist or communist regimes, but during World War II by Great Britain and the United States.

Observing political justice as a means of state protection leads Kirchheimer into a discussion of state protection in general, especially the dilemma that presents itself to the modern liberal-constitutional state where it is, or believes itself to be, in serious danger from an "opposition of principle," especially by opponents of the very bases of democracy, constitutionalism and individual liberty. Such enemies, in our days fascist and communist, want to make use of those very liberties of democracy which they are bent to destroy. How far can a democratic state go in its efforts to protect itself against such enemies without destroying its own foundations? How can state protection be squared with freedom of speech? What Kirchheimer has to say on this disturbing problem stands out among the mass of recent writing. Here, as in all other parts of his book, Kirchheimer draws on vast material taken from many parts of the world. The radical measures of the Federal Republic of Germany, finding itself directly confronted with efforts of communist penetration from East Germany, are contrasted with the cavalier attitude of Great Britain, believing itself to be immune. The vacillating, and at times frantic, American outbursts are shown to be due less to real danger than to politicians' attempts to ride a probably overestimated wave of popular fear and insecurity. Kirchheimer believes that at least some of the American advocates of radical measures may have felt that the harshness of their legislative proposals would be softened, or even declared unconstitutional, by the courts. To some extent this expectation has indeed been borne out, especially through the attitude taken by the United States Supreme Court in *Yates v. United States*.[1] That case has not been the last word in the political struggle about anti-subversive legislation. In later cases the Supreme Court itself has taken a more rigid approach, and local courts have frequently tended to lean in that direction.

Reviewing the broad scale of attempted state protection in the past and present, Kirchheimer reaches the conclusion that most of the measures are unnecessary where the opponents are insignificant, and that they are, in the long run, ineffective against an enemy representing the majority of the people struggling against a governing minority regime or a colonial power. In such generality this judgment appears too broad. It applies only to liberal constitutional regimes that have opened themselves to democratic ideology and lost faith in the justifications of their own rule. In our days such softening has gone so far as to result in the voluntary abdication of colonial rule. But where

[1] 354 U.S. 298 (1957).

there is a strong will to maintain power, minority regimes have been able to survive attacks from within as long as they have not been accompanied by defeat by the external enemy. The Czarist regime of Russia even managed to survive the defeat by Japan in 1905; it did not fall until the total defeat by Germany in 1917. Austria-Hungary survived all attacks by Czech, Yugoslav and Italian nationalists until the defeat in World War II. If, along with Kirchheimer, one regards pre-World War I Germany also as a country where a majority of the people was lorded over by a minority, it might be added as another illustration. However, the German example tends to indicate that the dichotomy, minority-majority, may be too simple. Not even the Social-Democratic Party which, as a matter of fact, never achieved a majority vote, constituted in its totality an opposition of principle. A government may well be drawn from a minority of the people and the majority may be content with, or at least acquiesce in, that situation. The futility of the half-hearted German attempt of the 1880's to suppress the Social-Democratic Party can indeed be used as a prime example of the problematic relationship between liberal constitutionalism and efforts at state protection. The German case does not constitute an example of the futility of vigorously attempted state protection against a popular majority. Neither was the majority opposed to the existing system, nor did that system ever undertake a full-fledged effort at determined suppression of even its declared enemies. Such an effort, if it had ever been undertaken, might well have run into trouble not only because it would have been contrary to the political climate of liberalism, but also because it could hardly have expected the full co-operation of the judiciary, which, as shown by Kirchheimer's own illustrations, was little inclined to harshness against such leaders of opposition as Bebel and Liebknecht.

Neither in Germany nor in the United States or other non-totalitarian countries have the courts corresponded to that communist over-simplification in which they appear as mechanical tools of the government—both government and courts simply constituting weapons of the ruling class in its struggle to keep down the exploited class. Neither, of course, have the courts been the never-flagging champions of individual freedom against governmental suppression, as they have occasionally appeared in Anglo-American oratory. Reality is more complex. Its sociological analysis by Kirchheimer is penetrating. Why do governments resort to courts at all? Why do they run the risk of being rebuffed by the courts and the danger of the political trial being used by the accused and his group as a public forum of the potentially highest efficiency?

These questions are answered by Kirchheimer in a searching analysis of the role of courts not only in political trials but in society in general. Obviously influenced by Max Weber, Kirchheimer finds the key in the deep human need for justification of the use of power. In order to be accepted, and thus to be stable, power must be felt to be "legitimate," *i.e.*, to correspond to postulates

accepted as self-evident. In our age, in which the exercise of power, in order to be accepted as legitimate, must be demanded by, or at least correspond to, reason, the reasonableness of the exercise of governmental power must be visibly demonstrated. This task of legitimizing in individual cases the exercise of governmental power, especially when it is directed against an alleged enemy, falls to the courts; the judges are the legitimizers of the exercise of governmental power. This insight proves itself a veritable key to the clarification of the problematic role of the judiciary in the political fabric.

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In summing up Kirchheimer returns to the comparison of political justice in constitutional and totalitarian regimes. In the former the existence of a "judicial space" is essential if the "detour" of the resort to trial is to fulfill its function of legitimating the governmental prosecution of the political foe. Only if the courts are left a space of freedom to exercise their own, though perhaps narrowly defined, judgment can political justice be expected to achieve its assigned end. There must be some risk of divergency between government and court, and thus some risk of the trial being used by the accused as a forum for effective advocacy of his cause. Where no such judicial space is left, the political trial can serve only the different functions of a potentially highly effective means of a totalitarian government to educate the populace along the ways desired. Whatever the regime, political justice "is bound to remain an eternal detour, necessary and grotesque, beneficial and monstrous."[2]

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MAX RHEINSTEIN*

* Max Pam Professor of Comparative Law, University of Chicago.

A Prof. Surveys Political Justice

"In the ideological fight for dominion over people's minds, the courts are agencies closely connected with public affairs," states Otto Kirchheimer in his new book "Political Justice" just published by Princeton University Press.

"From the closing days of World War I to Ben Gurion's desire to use the full account of the extermination of the Jews, uniquely provided in an Eichmann trial, as the focal point for Israel's self-assertion before continuing threats to its existence, there has been a neverending effort to enlarge the effectiveness of political action by resort to the courts."

According to author Kirchheimer, a professor of political science at Columbia University and a member of the graduate faculty at the New School for Social Research, courts not only serve to authenticate political action, but they provide "a new dimension through which many types of political regimes, as well as their foes, can affirm their policies and integrate the population into their political goals."

In 'Political Justice' Kirchheimer provides a new insight into not only the Eichmann trial, but into the Smith Act trials, the Communist purge trials, and, in general, into all court action which is party-directed and aimed at affecting power relations.

"What, then, is the function of courts in political strife?" asks Professor Kirchheimer. "In the simplest and crudest terms, disregarding for a moment the embellishments, 'enlargements' of function, and safeguards of the age of constitutionalism: the courts eliminate a political foe of the regime according to some prearranged rules."

"Political Justice" discusses and analyzes these rules in detail, describe the roles of major figures in the political trial and ends with an exploration into the nature of clemency and asylum, two countermands to the course of political justice.

Princeton, N. J.
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12/28/61

Courts' Role Reviewed In New Book

University Press Prints Book On Political Justice

Courts not only serve to authenticate political action, but they provide a "new dimension through which many types of political regimes, as well as their foes, can affirm their policies and integrate the population into their political goals," Prof. Otto Kirchheimer of Columbia University states in a new book just published by Princeton University Press.

The book is entitled "Political Justice." Prof. Kircheimer, a political scientist at Columbia, and also a member of the graduate faculty at the New School for Social Research, provides a new insight into not only the Eichmann trial, but into the Smith Act trials, the Communist purge trials, and, in general, into all court action which is partly directed and aimed at affecting power relations.

"In the ideological fight for domination over people's minds, the courts are agencies closely connected with public affairs," he writes.

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Prof. Kirchheimer raises a question as to what the function of courts is in political strife.

"In the simplest and crudest terms, disregarding for a moment the embellishments, enlargements of function, and safeguards of the age of constitutionalism: the courts eliminate a political foe of the regime according to some prearranged rules," he asserts.

The volume discusses and analyzes these rules in detail and describes the roles of major figures in the political trial. It ends with an exploration into the nature of clemency and asylum, two countermands to the course of political justice.

KIRCHHEIMER, OTTO. Political justice: the use of legal procedure for political ends. 462p $8.50 Princeton univ. press

320.1 Political science. Law 61-7418

An "analysis of the operation of the judicial process when used for political purposes—the ends it serves, the circumstances under which it is invoked, the manner in which it reflects and responds to political pressures. . . . [The author, a Professor of Political Science at Columbia University] considers political justice in many different periods of history, under a great variety of regimes, as illustrated by numerous cases." (Pol Sci Q) Bibliographical footnotes. Index.

"Considering the scope of this work, it is very much to Kirchheimer's credit that he kept control of almost all the many threads from which he wove this narrative. He lets the reins slip only rarely, and perhaps because the author is more at home in European sources than in matters concerned with the United States. . . . His emmissions suggest the need for a companion volume rather than an imbalance in the present one. I find more to criticize in the topical organization that the author employed. It led to piecemeal reporting and analysis and to repetitive summaries. . . . This is, nevertheless, a learned, successful, and significant work . . . destined for extensive use by workers in constitutional history and by all students of history and government." H. M. Hyman

+ — Am Hist R 67:679 Ap '62 650w

"Although Professor Kirchheimer appears generally to assume the positivist definition of law and remains faithful to his descriptive approach, delineating the material in terms of the assumptions, motives, techniques, and actions of practitioners of power, he now and then expresses judgments in 'ideal' terms. . . . However, such seeming contradictions do not significantly detract from this real contribution to jurisprudence. . . . The extensive footnotes not only enrich the book but indicate the wealth of materials used, many not available in English." J. P. Duncan

+ — Am Pol Sci R 56:432 Je '62 950w

+ Ethics 72:236 Ap '62 60w

+ Foreign Affairs 40:496 Ap '62 30w

Reviewed by J. L. Andrews

+ Library J 87:857 Mr 1 '62 180w

"Tales of state trials are naturally dramatic, and no one could have paraded them with greater erudition or industry than Otto Kirchheimer. . . . Whenever he recounts a particular case . . . he never fails to absorb the reader. Profiting from a European educational background, he not only includes several prosecutions that are unfamiliar to Americans, he also portrays familiar prosecutions in an unfamiliar perspective." Edmond Cahn

+ N Y Times Bk R p12 Ja 14 '62 850w

"There are perceptive discussions of the use of informers; the significance of insisting upon naming collaborators in political trials; the function of the security police; the treatment of defectors—including American insistence upon repentance; and public attitudes toward political deviants. Very little is available today that illuminates more sharply the problems of a modern democratic society seeking order, liberty and change under a rule of law. . . . Unfortunately, the style is obscure at times . . . but as one proceeds it gains in clarity and eloquence." T. I. Emerson

+ — Pol Sci Q 77:267 Je '62 800w

Political justice : The use of legal procedure for political ends, par O. KIRCHHEIMER. — XI + 452 p. — *Princeton University Press*, Princeton 1961.

M. O. Kircheimer procède à une enquête de sociologie politique. Quelle est, en définitive la portée de l'emploi général des procédures juridictionnelles à des fins politiques ? L'une de ses conclusions mérite d'être notée : « Les instigateurs d'un procès politique feront face à bien des incertitudes s'ils veulent utiliser la forme juridique pour des buts dépassant le harcèlement ou l'élimination d'un ennemi politique, et s'ils désirent s'aventurer sur le terrain de la création ou de la destruction des idoles. Les caprices du moyen qu'ils utilisent, la procédure juridique, se combinent à leur besoin de s'appuyer sur des témoins qui peuvent vivre dans un monde politique qui leur est propre, sans parler des adversaires qui peuvent imposer avec succès leur propre interprétation au juge ou aux jurés » (p. 118). L'ouvrage comprend trois parties : (I) Affaires, causes, méthodes ; (II) Le juge, l'accusé, et l'Etat ; (III) Droits d'asile et de grâce.

R. P.

Political justice : The use of legal procedure for political ends, par O. KIRCHHEIMER. — XI + 452 p. — *Princeton University Press*, Princeton 1961.

Mr. O. Kircheimer here makes a survey of political sociology. What, in the last analysis, is the scope of the general use of legal procedure for political ends ? One of his conclusions is worth noting : "The instigators of a political trial will face many uncertainties if they want to use the legal form for purposes beyond harassment or elimination of a political foe, and if they want to advance into the territory of image-creating or destroying. The vagaries of the medium they use, legal procedure, are compounded by their need to rely on witnesses who might be living in a political world of their own, not to speak of adversaries who may successfully urge their own interprétation on judge or jury" (p. 118). The work falls into three parts : (I) Cases, Causes, Methods ; (II) The Judge, the Defendant and the State ; (III) Asylum and Clemence.

R. P.

Journal du droit

East Europe
Dec. '61

POLITICAL JUSTICE, *by Otto Kirchheimer, Princeton: Princeton University Press, 1961, 452 pp., $8.50.*

This is an analysis of the components and the strategy of political justice—the motives, techniques and actions of its practitioners and its victims. The author, a professor of political science at Columbia University, discusses cases in which the rulers of totalitarian, Communist and even democratic states have used the agencies of criminal justice for their own purposes while trying to maintain a balance between abstract justice and political expediency. He examines the structure of state protection, the forms of legal repression used by the state against political organizations and the nature of a political trial. Basing his analysis primarily on foreign sources, he covers the Nuremberg trials, the Communist purge trials and a number of Smith Act trials. There is a special chapter on "socialist legality," describing the nature of political justice in the USSR and Communist East Germany during the Stalinist era and after. Index.

Otto Kirchheimer: POLITICAL JUSTICE—The Use of Legal Procedure for Political Ends. Princeton University Press, Princeton, N.J., 1961, pp. 425, $8.50.

This book by a Columbia University professor of Political Science is, in the judgment of this reviewer, a fine example of scholarly writing; a kind of writing, which, all too often is marked by long obscure sentences and the excessive use of footnotes. There are many

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footnotes in this book, but they serve only to reveal an enormous amount of reading of relevant material in several European languages. The result is a veritable mine of information on the subject of "Political Justice."

"Every political regime has its foes, or in due time creates them," is the opening sentence of the first chapter. True, and because of this, from the very beginning of organized government, one of its most perplexing problems has been how to deal with the dissenter and the rebel.

No two political trials are ever exactly alike, but what the author calls, ". . . the two most momentous trials in history," those of Socrates and Jesus, illustrate points that arise in many such trials. Socrates made, what we would call today, a defence of 'free inquiry,' and the right for one to follow his conscience. In the case of Jesus, the charge against him was that he had talked about his allegiance to what seemed to his hearers to be higher authority than the Roman Emperor. This same charge came to mark that trials of the early Christians; and they, therefore, were convicted primarily on political rather than religious grounds.

The problem of the critic and the dissenter has never been a difficult one for despotic governments. In Czarist Russia, as late as the beginning of the Twentieth Century, Nicholas II could sit down at his desk and with a personal note banish even a Grand Duke. And, of course, Hitler, after attaining complete power, had no difficulty in disposing of his enemies. Many think that such exercise of absolute authority is a thing of the past, or is confined to Communist states. Not so says the author, for ". . . it is going on right now under our very eyes in many non-Communist countries, such as Spain, Portugal, Greece, Algeria, and, Israel excluded, the countries of the Middle East."

But it is the constitutional governments that have the greatest difficulty in even approximately dealing out 'justice' to the dissenter. "Constitutional governments have many times been able to curtail drastically the activities of their adversaries. But, if they want by death or imprisonment to eliminate them entirely from the community, they must utilize the agency of a court, with all the . . . hazards such action incurs."

The casual reader may ask; What hazards? The chief one always present is that thoughtful people of a later period, perhaps only ten or fifteen years, will raise the embarrassing question as to whether justice was done the accused. In a chapter on "The Judge," the author, after citing many cases from the post war courts of England, France, West Germany, the Scandinavian countries and our own country says that in time of stress in which the public calls for victims, it is the judge who has to make the most difficult decisions. "Probably in no sector of our population has there been deeper soul searching than in the judiciary."

In such a book the subject of 'the jury' could not be omitted, for men still differ as to the usefulness and the fairness of this ancient institution. One whole chapter is devoted to the subject. In the course of an exhaustive analysis of the jury system, the author mentions certain aspects of the jury system familiar to us in the U.S.A., such as the "Blue Ribbon" juries of certain N.Y. Counties; the "government employee" jury of Washington, D.C.; the "court house loungers of many U.S. Counties; and the "all white" juries of some Southern states.

Near the end of the book the author deals with what he calls "the ever present phenomenon of poltical asylum. Here is something that begins as early as recorded history and comes down to and affects the latest defector from or to the Soviet Union. One principle seems well established in such cases: namely, that asylum is not a matter of right; but is a privilege to be granted or withheld.

We can bring this review to a close by saying it is evident in all countries that the organized state is less just, less kind, less forgiving than are the individuals composing that state. To ask the state, which feels itself endangered, to be just is to ask the impossible. Long ago the great German historian, Theodor Mommsen said, "impartiality in political trials is about on the level with Immaculate Conception;

one may wish for it, but one cannot produce it. But the great Cardinal Richelieu, recognized as one of the great statesmen of all time, put the matter more bluntly. He said, "In normal affairs, the administration of justice requires authentic proof; but it is not the same in affairs of state. . . . There urgent conjecture must sometimes take the place of proof; the loss of the particular is not comparable with the salvation of the state." As is evident, this comes close to the doctrine that the end justifies the means, and that is where we will have to leave the matter.

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Die Justiz als politische Waffe

"Political Justice—The Use of Legal Procedure for Political Ends" by Otto Kirchheimer
Princeton University Press, 1961. $8.50

Otto Kirchheimer, in Heilbronn geboren, Dr. jur. der Universität Bonn, Professor an der New School for Social Research in New York, und letzthin Fulbright Professor in Feiburg i. Br. hat mit seinem Werk über die politische Justiz einen hervorragenden Beitrag zur Wissenschaft des Rechts und der Politik geleistet. Auf 452 Seiten analysiert er den Gebrauch und Missbrauch, den politische Machthaber oder Funktionäre der Justiz selbst mit der Rechtssprechung seit Jahrhunderten getrieben haben. Mit umfassenden Quellenkenntnissen ausgerüstet, behandelte er die Justiz der anglosächsischen Länder mit der gleichen Intensität wie die des europäischen Kontinents z. B. der französischen Revolution, der Monarchien, der Weimarer Republik, der Bundesrepublik, des Ostblocks, der Alliierten nach dem II. Weltkrieg, und schliesslich den politischen Justizfall Eichmann.

"Acht Jahre Politische Justiz" hiess eine Denkschrift der deutschen Liga für Menschenrechte, an der E. J. Gumbel, K. Grossmann und ich vor 34 Jahren gearbeitet hatten. Jetzt hat Kirchheimer auch dieses Thema wissenschaftlich behandelt und gezeigt, wie die Unterminierung einer Demokratie auch durch anti-demokratsiche Justiz-Kräfte erfolgen kann, die politische Mörder laufen lassen und Anhänger der Demokratie durch "Urteile" diffamieren.

Kirchheimers wissenschaftliche Analyse der nationalsozialistischen Einwände gegen die Nürnberger Prozesse ist besonders zeitgemäss. Wie notwendig seine Klarstellungen sind, zeigt eine erst kürzlich stattgefundene grosse Diskussion über die Bewältigung politischer Schuld in Strafprozessen vor der Katholischen Akademie in München. Mit Recht hat Paul Wilhelm Wenger im "Rheinischen Merkur" auf die bittere Tatsache hingewiesen, dass bei dieser Diskussion einige Juristen den Versuch machten, die strafprozessuale Bewältigung von Massenverbrechen als juristische Missgriffe abzuwerten.

Das Buch Kirchheimers sollte daher auch an deutschen Universitäten und Gerichten weite Verbreitung finden.

"The Price of Liberty" by Alan Barth
The Viking Press, New York 1961. $4.50

Alan Barth, Leitartikler an der Washington Post und politischer Wissenschaftler, setzt in einer glänzend geschriebenen wissenschaftlichen Studie auseinander, wie unsere Grundrechte durch gewisse Massnahmen von Justiz- und Polizeibehörden ständig bedroht werden. Er beschäftigt sich mit unrechtmässigen Verhaftungen, Missbrauch von Geständnissen, Verletzung der Privatatmosphäre durch Abhörvorrichtungen und ähnlichen ungesetzlichen Akten.

Das gesamte Problem der Grenzziehung zwischen den Rechten des Bürgers und denen des Staates zum Schutz der Allgemeinheit wird in diesem ausgezeichneten Buch auf 212 Seiten an praktischen Beispielen behandelt, die aus der grossen Journalistenerfahrung des Verfassers stammen.

Robert M. W. Kempner

Antfan 2-2-62

POLITICAL JUSTICE: The Use of Legal Procedure for Political Ends. By Otto Kirchheimer. Princeton, Princeton University Press: Melbourne, Oxford University Press, 1961. Pp. xiv + 452. 88/-.

Implicit in Professor Kirchheimer's discussion of the use of legal proceedings by the power holders in the struggle for power which is called "politics" is the view that law is both a function of and a force in society. Judicial realism, which underlies the analysis Kirchheimer presents, accepts the view that both the law and society are in flux, with the latter moving at a faster pace than the former; law is not an end in itself but is a means to social ends. It is important to look at the rules by which courts operate, but these are not the most important factor in the decision-making process. Courts, often held to be the interpreters of the law, are called upon to decide questions relating to the political goals of the regime and, given certain exceptions peculiar to constitutionalism, the courts act to "eliminate a political foe of the regime according to some pre-arranged rules." The courts may give a necessary legality to formal restrictions placed on the enemies of the regime, or they may inhibit certain activities of these enemies, or they may dramatise to the public the conflict raging between them and the regime. It is Kirchheimer's contention that with the advent of mass society there has been a growth in the use of courts as political weapons by political regimes; in a carefully documented, scholarly study, distinguished by a methodology that is not found often enough in work done in the social sciences, Kirchheimer presents his case. It is unfortunate that the examples used to illustrate the discussion are drawn almost exclusively from the history of Europe and the United States, but this is not a very important criticism of the book.

Changes have come about in the type of protection afforded by the regime (the word is used in the widest sense) to the political dissenter. Among the many changes analysed is one of particular significance to constitutional democracies: today, the regime hands down punishments not only to those who use violence to overthrow it but also to those who use propagandistic methods to bring about the same result. Because of the effect of political propaganda in a mass democracy, the area of prohibited activity has become enlarged; a democratic government, faced with the theoretical paradox of having to allow open dissension and, at the same time, to preserve itself, must decide whether it will prevent or restrict such dissension. Germany and the United States solved the problem with respect to the Communist Party one way; Australia, another. In discussing the approaches of these three countries, Kirchheimer differentiates between a theoretical approach and a political approach: "While the man of theory might reason that a basically sound democratic society need not fear the appeal of antidemocratic philosophies, the practical politician is likely to be more impressed with the assumption that those in charge will never tolerate adverse activities that may cause tangible damage." The judge will have to weigh the variables of the situation (means-ends relations, advocacy of doctrine, past experiences, future possibilities, and so on) and then decide on the limits to be set to the dissension. Kirchheimer is not so naive as to think that such a decision is one purely of law or of fact; such questions are for him political questions, but courts are, after all, involved in politics.

Moreover, running throughout his analysis of this and other problems is the subtle but vital distinction between the motives of the regime in acting as it does and the justification, by the analyst, of those motives. Kirchheimer is interested in presenting the first while staying as far away from the second as possible. He tries to divorce the *is* and the *ought* for purposes of study; in setting the boundaries of his inquiry, the analyst has necessarily resorted to value judgments, but once the inquiry is set in motion the analyst must try to not let his personal wishes intrude into the discussion. Kirchheimer is not always successful in making the separation, but at least he gives the reader clear indication when he is justifying a regime's motives. In speaking of the ways in which regimes come to terms with opposition of principle (*eg*, the reaction of the French and Italian governments towards the Communist Party), he discusses the contrast between the formal freedom allowed such opposition and the actual restrictions placed in their way; here he takes no sides. But, when he discusses the Nuremberg trials—the nature of the charges and the rejoinders of the critics of the trials—he not only shows what the Tribunal hoped to accomplish but also why they were right: "while it retained many overtones of the convenience type of trial, did the Nuremberg trial, with all the hypocrisy and the grotesqueness deriving from its very subject, not belong very profoundly in the category of a morally and historically necessary operation ?"

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What are the consequences of political justice? Its aim is "to enlarge the area of political action by enlisting the services of courts in behalf of political goals". Particular circumstances will dictate how a regime should deal with its foes, but the alternative to the "use of legal procedure for political ends" is arbitrariness, a far less inviting prospect. Leaving aside the results, which will be varied, political justice does, as Kirchheimer asserts, give a sense of order to the struggle for political power. Up until this point, particular care has been taken to sum up what political justice is. It is a subject of transient character: "changes in political requirements and perspectives are nonetheless in the nature of things." Yet, Kirchheimer also warns the reader that "there are fundamental minimum requirements of human decency which are valid for all regimes and all proposed solutions and cannot be waived either in advance or retrospectively". There is a tension between these two ideas—a tension which Kirchheimer has neither analysed nor avoided. What if these minimum requirements are not met? Is it then to be said that political justice has not existed? If the terms are so defined, as they are, to mean the use of legal procedure for political ends, then reference need not have been made to these ultimate values. As Professor Alf Ross has pointed out: "The ideology of justice has no place in a reasonable discussion of the value of laws."

Canberra S. J. SILVERMAN

HOLMAN VERSUS HUGHES: Extension of Australian Commonwealth Powers. By Conrad Joyner. University of Florida Monographs; Social Sciences, no. 10, 1961. Pp. 70. $2.

Joyner sets out to trace and analyse the tussle within the Labor camp between W. M. Hughes and W. A. Holman over the 1911, 1913 and 1919 Commonwealth proposals for enlarged Federal constitutional powers. Hughes of the Federal parliamentary wing of the party (in 1919 as a Nationalist) was the moving spirit behind all three referenda. His old NSW Labor ally Holman, first as Deputy Premier and then as Premier, was probably the key figure in opposition to at least the first and second of these efforts at constitutional amendment.

This is one of the most promising Australian topics which any American Fulbright political scientist has chosen. The monograph here presented is, however, almost certainly too short to do it justice, even within Joyner's chosen limits. But the fact is that Joyner's scholarship also appears to be sadly inadequate to the job. He has apparently failed to assimilate the indispensable background of fact and usage, while he himself is revealed as a really sloppy scholar. Altogether, the monograph will disappoint and irritate scholars, and should not be placed in the hands of young students who as yet lack the necessary equipment for picking their way safely amongst misinformation and misleading material.

The onus is on a reviewer to substantiate such a sweeping condemnation. A complete bill of particulars would be too long and tedious. Some illustrations from the earlier pages must suffice. (1) In the matter of failure to assimilate customary usage: on p. 11 and elsewhere the term "coalition" is erroneously applied; on pp. 17 and 18 the term "budget speech" is most misleadingly used. (2) As regards inexcusable errors: on p. 12 the statistics of the membership of state parliaments are haywire (incidentally Joyner appears unaware that at that time members of the NSW and Queensland Upper Houses were nominated and not elected); on p. 12 we are asked to believe that there were only wages boards and not industrial courts or commissions in (a majority of) the states through most of the decade with which Joyner is primarily concerned; on p. 13 the first Federal Labor objective is attributed to the Fourth (Brisbane) Conference of 1908 instead of the Third (Melbourne) Conference of 1905; on p. 14 (and 28) Holman is referred to as NSW parliamentary leader in the period 1908-11 (which he was not until 1913) and on p. 17 McGowen appears as NSW Premier in 1909 (which he was not until 1910). Sloppiness reaches its peak on p. 25, where of eight names mentioned in the text no fewer than five are misspelt and the Labor MLA for Murrumbidgee, and the fine old town of Wagga Wagga, appear as Victorian!

There are, however, more serious objections still to Joyner's monograph. Every author is entitled to his point of view and this reviewer would and should be the last to object to a little

of attitude toward the future may also be detected in many representatives of Protestant theology, notably Karl Barth and Albert Schweitzer. Polak summarizes the results of his penetrating analysis in an important chapter entitled "The Future of the Christian Belief-system."

It is impossible to do justice to the universal scope of these studies within the limits of a review. They are nothing less than an intellectual history of the twentieth century from the perspective of the image of the future. They reveal an extraordinary degree of learning and a sensitive erudition even upon such subjects as atonal music or abstract painting.

In his concluding chapter, Polak writes, "Western civilization is not lost beyond the possibility of salvation . . . if we can find the right answer to the almost overwhelming challenge which the future offers to our time." But here lies the difficulty. The trends that Polak analyzes so knowledgeably—existentialism, orthodox Christianity, and essence-pessimism—are in themselves symptoms rather than causes of the evils that beset Western civilization. The image of the future cannot be re-created by a simple fiat. Polak shows that he is aware of this inherent contradiction when he admits, "To choose our vision, we first have to have a vision." It is here that the problem comes to rest.

Sweet Briar College GERHARD MASUR

POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By *Otto Kirchheimer.* (Princeton, N. J.: Princeton University Press. 1961. Pp. xiv, 452. $8.50.)

PROFESSOR Kirchheimer of Columbia University and the New School offers a weighty contradiction to Aristotle's fond delusion that "the law is reason unaffected by desire." In brave leaps and broad bounds across time and place, the author proceeds topically to examine the many guises that political trials have taken, and assume today. He took on a task of large magnitude and great complexity. The story of political justice involves governments, political parties both legitimate and illicit, judges, lawyers, and defendants. It ranges from medieval proceedings to the Hiss and Eichmann causes and to the 1961 term of the United States Supreme Court. Considering the scope of this work, it is very much to Kirchheimer's credit that he kept control of almost all the many threads from which he wove this narrative.

He lets the reins slip only rarely, and perhaps because the author is more at home in European sources than in matters concerned with the United States. As an example, the footnote on page 137 contains minor errors. A mistake of greater significance occurs on page 407, where Kirchheimer suggests that Lincoln's 1863 pardon program had little immediate effect. The evidence points to a sharply different, if not opposite, conclusion.

Kirchheimer has not merely catalogued *causes célèbres.* Rather he picked and

chose, primarily from Europe's history, for instances of political justice and injustice that illuminated his thesis. Some readers may protest that the author concentrated on Western Europe, but omitted comment on Spain or Latin America. There was quite enough to occupy Kirchheimer in what he undertook. His omissions suggest the need for a companion volume rather than an imbalance in the present one.

I find more to criticize in the topical organization that the author employed. It led to piecemeal reporting and analysis and to repetitive summaries. This organization, together with the "academic" prose style that dominates and strait-jackets the flow of narrative, makes progress through the text glacially slow. Ironically, Kirchheimer in a footnote describes a book as a story "told in stilted narrative." So is this one, except for infrequent and welcome flashes of warm, vivid imagery.

This is, nevertheless, a learned, successful, and significant work. For the first time, a reliable, thorough guide is available to those power mechanisms functioning through the courts that have played such an important role in the development of modern nations. These mechanisms, Kirchheimer depressingly concludes, promise further to expand the use of political trials even in the free lands of the world. More than ever, courts will be involved in politics, if only because cold war pressures are almost everywhere bringing forth enlarged internal security programs.

Whatever the pattern for the near future, Kirchheimer deserves the gratitude of all those who seek guidelines from the past. His book is destined for extensive use by workers in constitutional history and by all students of history and government. I hope that makers of policy as well as scholars read it.

University of California, Los Angeles HAROLD M. HYMAN

EMPIRE. By *Richard Koebner*. (New York: Cambridge University Press. 1961. Pp. 393. $8.50.)

SCHOLARS have been impatiently waiting for this book since Professor Koebner's learned and weighty articles on its themes began to appear in English historical journals some years ago. It exceeds their high expectations, which were based on more than the articles. The extraordinary depth of his learning in wide fields of history from classical to modern times impressed those who met him in London, where he settled in 1953, after retiring from the Hebrew University of Jerusalem. His interest in the book's theme, stirred when, as a rising German historian, he paid a visit to England in the mid-twenties, was intensified by his experience of empire under international mandate in Palestine. This first volume, long in preparation, carries the story down to the Napoleonic period. The second, now being written from Koebner's drafts and notes, brings it down to the present day. Seventy pages of critical and bibliographical notes add great value to the book.

The theme of the book is the history of the word and idea of empire (imperial,

KIRCHHEIMER (OTTO) — *Political justice*. The use of legal procedure for political ends. — Princeton (N.J.), Princeton University press, 1961. 24 cm, XIV-452 p. Index. $ 8.50.

Voici un ouvrage de grande valeur dont il faut espérer une prochaine édition française. Pour s'attaquer à un tel sujet, l'auteur devait être à la fois juriste et politiste, avoir une large culture historique et un sens aigu des réalités de notre temps. Otto Kirchheimer remplit parfaitement ces conditions. De plus, sa triple expérience de l'Allemagne, de la France et des Etats-Unis, où il occupe une chaire de science politique à la Columbia University après avoir été pendant de longues années chargé des affaires européennes au Département d'Etat, lui a permis de se placer tout naturellement dans une perspective comparative et de tenir compte à chaque instant de la tradition juridique et idéologique du pays considéré. La richesse de la documentation est étonnante. Les références à la France, par exemple, ne comprennent pas seulement des livres du XIX^e^ siècle ou des traités de droit, mais aussi les analyses de Casamayor, les articles de J.M. Théolleyre, les prises de position de M^e^ Halimi dans les *Temps modernes*, incorporant encore le bilan « Les atteintes à la sûreté des Français » paru dans *Esprit* en mars 1961. La documentation allemande ou américaine est aussi variée et aussi à jour.

Pour exposer les résultats de ses recherches et de ses réflexions, Kirchheimer a rencontré une difficulté classique : comment faire comprendre la complexité d'un cas sans se perdre dans les détails ? Comment systématiser sans renoncer à l'analyse minutieuse ? Il l'a résolue par un compromis qui a l'avantage de rendre la lecture à la fois variée et constamment intéressante, et l'inconvénient de faire perdre parfois le fil du développement, retenu qu'on est pendant un long moment par l'exposé détaillé d'une affaire particulière. L'auteur entremêle en effet l'exposé synthétique et la présentation par la méthode des cas. C'est ainsi que, sur les six sections du chapitre III, « Le procès politique », cinq sont systématiques. Mais après « Procès politique et procès criminel » et « Le procès pour meurtre comme arme politique », on trouve « Etudes de cas pour la signification de la trahison » avec une présentation originale de deux procès célèbres, l'affaire Caillaux ou le cas de « l'opposition comme trahison » et le procès en diffamation intenté par le président Ebert contre un journaliste de droite. Parfois, c'est la majeure partie d'un chapitre qui est consacrée sinon à une seule affaire, du moins à un seul pays : le chapitre « Le " centralisme démocratique " et l'intégration politique Allemagne de l'Est » et la moitié du chapitre « Jugement par ordre du régime successeur » parle du procès de Nuremberg. Mais qu'il s'agisse d'exposé systématique ou d'analyse de cas, jamais Kirchheimer ne verse ni dans l'abstraction gratuite ni dans le récit anecdotique.

Le livre est divisé en trois parties inégales, la troisième traitant de deux sujets qu'on ne rattache pas d'habitude à la justice politique : le droit d'asile et la clémence, cette dernière incluant les divers types d'amnistie. Qu'est-ce qui caractérise donc cette justice politique dont le contenu et les méthodes sont étudiées dans la première partie ? C'est une justice où « l'action de la Cour est mise en œuvre pour exercer une influence sur la distribution du pouvoir politique ». Cette action peut être amenée par un gouvernement contre ses ennemis politiques, par un régime contre ceux qui le mettent en cause, par les adversaires des gouvernants pour les discréditer, etc. L'utilisation de la procédure est parfois plus déterminante que le contenu de l'accusation pour savoir s'il y a procès politique (affaire Calas, affaire Kravchenko, etc.) De plus, l'état de l'opinion, la nature de l'idéologie dominante, les mécanismes

institutionnels eux-mêmes interviennent sans cesse dans l'élaboration et l'interprétation de la loi. Ainsi le simple désir d'un changement constitutionnel a longtemps été considéré comme un délit. Dans la plupart des pays « occidentaux », il n'en est plus ainsi. En revanche, toute une philosophie juridique de l'atteinte à la sûreté de l'Etat, de la subversion non seulement exécutée mais projetée s'est développée dans les Etats qui se veulent les plus libéraux. Kirchheimer analyse la loi fédérale suisse de 1950 et l'affaire André Bonnard qui en est résultée (un professeur à l'Université de Lausanne avait communiqué des renseignements sur la Croix-Rouge suisse au Mouvement de la Paix). Il s'étend plus longuement sur l'étrange situation de la République fédérale face à l'Allemagne de l'Est, étudiant notamment les affaires John et Agartz. Il consacre un chapitre entier à « la répression légale d'organisations politiques » en partant de nombreux cas du XIX^e^ siècle pour aboutir à un examen serré des critères de répression utilisés contre les groupements considérés comme antidémocratiques. Dans le cas de l'action anticommuniste aux Etats-Unis et en Allemagne, le verdict de la Cour, dans la mesure où il est fondé sur la doctrine du groupe incriminé plutôt que sur son action, devient, selon la formule du juge Jackson, « une prophétie sous forme de décision légale ». Les conclusions que Kirchheimer donne à ce chapitre sont pondérées à souhait.

La seconde partie est consacrée aux acteurs : le juge, l'accusé, le défenseur, l'Etat. L'auteur montre l'influence qu'exerce sur la justice politique la sociologie de la magistrature. Dans sa conclusion générale, il insistera de nouveau sur le rôle particulier des magistrats s'il y a changement de régime (il cite Pasquier disant en 1850 : « Je suis l'homme de France qui a le plus connu les divers gouvernements qui se succèdent : je leur ai fait à tous leur procès ») et sur la notion d' « espace judiciaire », c'est-à-dire de pouvoir d'appréciation laissé au juge par le pouvoir ou par l'idéologie dominante. Le comportement de l'accusé est surtout intéressant à étudier à propos de sa volonté d'identification à un groupe, tandis que le problème de l'avocat est celui de l'identification à la cause politique du client. Nous ne pouvons pas entrer dans le détail de considérations dont la pertinence et l'actualité sont saisissantes si on les applique à la France des années 60.

On peut bien entendu regretter que, tel ou tel aspect auquel on attache soi-même de l'importance n'ait pas été mieux mis en évidence. Ainsi la notion de légitimité, ainsi le concept de trahison. Tel ou tel passage peut aussi paraître insuffisant. Les quelques pages consacrées à la justice sous le III^e^ Reich sont bien rapides. On doit aussi déplorer l'absence de toute bibliographie systématique. Mais il est difficile de ne pas admirer et approuver la lucidité et la netteté des conclusions qui montrent à la fois la faiblesse et l'utilité de la justice politique. La faiblesse est généralement admise. Qui ne dirait avec Kirchheimer : « S'il est vrai que le jugement peut entrer dans l'histoire, il est rare qu'il devienne le verdict rendu par l'histoire elle-même » ? L'utilité résulte déjà de la supériorité que la procédure présente par rapport à l'arbitraire pur. Elle provient aussi des répercussions du procès sur l'opinion et, par contre-coup, sur la répartition des forces politiques. La caractéristique fondamentale de ce livre si riche et si stimulant est peut-être d'être vraiment un ouvrage de science politique, c'est-à-dire de tenir compte de toutes les dimensions psychologiques, sociologiques et institutionnelles d'un sujet en apparence purement juridique.

Alfred GROSSER

Yale Law Journal, June 1962

POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By Otto Kirchheimer.* Princeton, N.J.: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

PROFESSOR Kirchheimer's book is a richly detailed study of a subject which has received less than deserved attention in English and American publications. By the author's definition, "The aim of political justice is to enlarge the area of political action by enlisting the services of courts in behalf of political goals."[1] This purpose involves the partial or complete destruction of what Professor Kirchheimer calls "judicial space"—the uncertainty of judicial result which reflects the impartial deliberation of a court insulated from legislative or executive control. In its most blatant form, political justice transforms the judge into a virtual "errand boy" who must follow the latest signals from the political authority above him.

Professor Kirchheimer is fully aware of what Max Lerner, writing a generation ago, called the "relativist character" of political justice. In a procedural sense, it is often difficult, indeed, to draw the fine line between a true court and a drum court. In a substantive sense, what is or is not "political" varies in time and place. This relativism is abundantly demonstrated in an early chapter entitled "The Political Trial," which surveys such widely disparate situations as the crime of murder committed for political purposes after the contested 1899 Kentucky gubernatorial election, the rigged treason trial of French statesman Caillaux after World War I, the 1924 defamation action of Reich President Ebert, various Swiss and West German cases arising in the 1950's under broadened ranges of political offenses, and Stalin-type trials which pass beyond the pale of constitutionalism. In addition to the relatively familiar techniques of repression and trial to which a regime may resort against its foes, the author also examines three extraordinary devices of political justice: asylum, clemency, and the Nuremberg-type trial by fiat of a successor regime.

The endless variety of motivation, strategy, and result involved in the use of political justice obviously fascinates the author, and certainly he is effective in transmitting his fascination to the reader. Under what circumstances is it strategically necessary, possible, or convenient for a regime to resort to courts for political purposes? How effective is political justice in "legitimizing" or "validating" a regime, in integrating society around its goals, in providing some sense of vicarious popular participation in the regime, in creating out of past events useful images for future purposes, or, most crudely, in eliminating foes? To what extent is "political justice without risks" a contradiction in terms in the sense that rigging the results of adjudication ahead of time betrays the desired impression of "legitimacy"? How are the traditional relationships among judge, jury, prosecution, defendant and defense counsel perverted once courts are forced into the arena of political strife? Finally, to what degree is

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1. P. 419.

political justice normatively justifiable, or preferable to other more direct forms of political action?

In this reviewer's judgment, the book deals most successfully with these questions in the two chapters on "Legal Repression of Political Organizations" and "Democratic Centralism." The first analyzes the motivations, criteria, and efficacy of American, West German and English attempts to repress the Communist party. The author clearly favors the English policy of repression only after specific acts violating the legal order have occurred, in preference to the American attempt to judge on the basis of inferred, remote consequences, or West Germany's total proscription on the basis of party doctrine. However, he recognizes the unique political and legal context which the English solution reflects, as well as the respective impacts of foreign policy and domestic political factors on West German and American patterns of repression. Touching briefly on the grave difficulties of repression once the target has become a mass movement, as in France or Italy, Professor Kirchheimer reaches the sobering conclusion, "The course of repression in a democratic society is paradoxical indeed. When foreseeably effective, repression seems unnecessary; when advisable in the face of a serious threat to democratic institutions, it tends to be of only limited usefulness, and it carries the germ of new, perhaps even more menacing dangers to democracy."[2]

The chapter on "Democratic Centralism" moves beyond the pale of constitutional procedure to expose brilliantly the anatomy of political justice in contemporary East Germany. Here "maximal harmonization of judicial activity with official policies" is achieved through an elaborate array of formal and informal control devices, including uncertain tenure, extraordinary appeals, and interference in the process of adjudication by party functionaries. "No decision of any consequence can ever be established as a precedent unless it conforms to the official policy of the day."[3] In turn, the norms which constitute official policy are in constant "gyration" and "fluctuation," depriving East German legality of even minimal coherency.

If these two chapters display the impressive scholarship, insight, and judgment which characterize the book as a whole, they also have a sharpness of focus which the book's over-all analysis lacks. Although Professor Kirchheimer is very much aware of the relativist character of political justice, it is perhaps not unfair to say that he seems to relish that relativism rather than attempting to structure it. The book is rich in analytical insights, but, to borrow from the title of one of Isaiah Berlin's books, they are the insights of the "fox," not of the "hedgehog." They do not build toward any overreaching thesis or *Gestalt*. At the end of the book, one is immensely better informed than at the beginning, but also curiously uncertain about the conclusions to which the argument has led and whether the outlines of the category of political justice have been sharpened or blurred. The word "panorama," which the author

2. P. 172.
3. P. 266.

disclaims at the outset, may well be the fairest description of the work. It is of course no criticism to say that the panorama does not survey *all* the phenomena of political justice. The very selectivity of materials, however, may carry with it the obligation of a somewhat sharper focus than Professor Kirchheimer achieves. To change the metaphor, the proverbial Procrustean bed was surely not the only alternative. For example, the author might have worked more explicitly within the configuration of history, as he did in his earlier co-authored book, *Punishment and Social Structure*. Despite his greater concern in the present work with the contemporary period, he does draw frequently on historical materials and is clearly preoccupied with the nation-state's retreat, since World War I, from its earlier "magnanimity" toward political dissent. More pointed emphasis on this historical theme throughout the book would perhaps have tightened up the analysis.

Since the concept of "judicial space" is also an important concern of the book, another approach might have been to place the phenomena of political justice on a continuum ranging from maximum to minimum judicial space. Although there is more than a hint of such a continuum in the work as it stands, this approach also is never developed in any explicit fashion. Had it been, a number of important problems might have been faced squarely rather than obliquely. In a book which is scarcely "value free," it is more than a little disconcerting that the analysis is not really grounded in any clear theory of law. True, Professor Kirchheimer does lay out something of a model of "judicial action," emphasizing the procedural norm of immunity from governmental pressure, the "interstitial" character of a court's individualizing of general rules to particular cases, and the reciprocity which ought to exist between adjudication and community values. Yet, this model comes at an odd point almost half-way through the book and its relation to the over-all analysis is disappointingly unfulfilled. For example, the author never quite comes to terms with the classic question, "What is a legal system?" Grant his dismay with the erosion of impartiality, the capricious fluctuation of norms, and recourse to retroactive, unpromulgated "legality," where along the continuum of decreasing judicial space does a legal system cease to exist, if it does? In light of much of the material with which the book deals, this is obviously more than a moot question.

Aside from the emphasis on impartial, coherent, regularized procedure, one is also puzzled by the degree or sense in which Professor Kirchheimer is concerned with the substantive content of norms. At one point he observes that courts succumb to political partiality most frequently in fragmentized political contexts, as did Weimar Germany, or during a totalitarian regime's attempt to impose from overhead a new ideology on society. Then, somewhat later in his discussion of East Germany, he concludes, "When the regime's major goals have been fulfilled and its spiritual and social dominion safely anchored, the eternal guard against individual slackening may be relaxed—and a referee allowed to mark points for both sides."[4] This may indeed prove to be an ac-

4. P. 299.

curate prophecy, but one wonders exactly what it means in terms of political justice. Once the totalitarian regime has triumphed, and judicial space is restored, does the phenomenon of political justice end? Probably not. First, there will probably still be occasional extraordinary instances of interference with the referee. Second, in a more profound sense, tolerance of the referee reflects not only the regime's secure establishment in society at large, but also the fact that the politicizing of the judiciary itself has been carried through successfully. Norms may now be coherent and regular, but their content and the courts implementing them are still "political." It is this second point that Professor Kirchheimer, in his seemingly positivistic emphasis on regularity and coherence, does not make sufficiently explicit. It would certainly be unfair to imply that he is oblivious to the substance of norms, or unaware that, procedure aside, the substance of a norm can itself be outrageous. On a number of occasions he even seems to use the language of natural law in condemning "atrocious offenses against the human condition" and postulating "fundamental minimum requirements of human decency."[5] Indeed, it is ultimately in these terms that he judges Nazi Germany and justifies that unusual instance of political justice, the Nuremberg trials. One may agree with his normative conclusion, however, and still be disconcerted at the failure to establish a bridge between his preoccupation with regularized coherence on the one hand and these apparently substantive natural law standards on the other. Professor Kirchheimer may well agree with Professor Lon Fuller that "coherence and goodness have more affinity than coherence and evil." But if he does, this assumption receives no clear recognition or elaboration. The result is ambiguity not only in the author's own view of law, but also in the objective relationship that political justice may have to the problem of positivism *versus* natural law.

Finally, the notion that political justice appears most frequently in fragmentized political contexts raises a question about the institution of judicial review as practiced in America. Although Professor Kirchheimer discusses various specific instances of judicial review, he does not identify the institution in general as an illustration of political justice. Assuming the wide range of purposes and devices which the author surveys, however, perhaps it is quite possible to consider American reference of high policy issues to judicial tribunals as an interesting example of the very subject of the book. This suggestion is offered with some hesitancy and full awareness of the difficulties involved. At the same time, surely judicial review does involve courts in the arena of strife over political goals. It is also significant that while Professor Kirchheimer sees a regime's desire to "legitimize" its actions as a perennial motive for the resort to political justice, Professor Charles Black in his recent book on the Supreme Court [6] uses this same phrase repeatedly in describing the function of judicial review over legislative and executive acts. Professor Black of course views this legitimizing function as instrumental in the engi-

5. Pp. 341 and 429. See also pp. 322 and 328.
6. BLACK, THE PEOPLE AND THE COURT (1960).

neering of consensus in the American polity. Granted that there may be a reciprocal relation between judicial review and such consensus, one can argue that Professor Black really has the cart before the horse and that essentially it has been the *pre*-existence of a deep, pervasive consensus on basic values which has made policy issues susceptible to legalistic decision in America. In any event, we are left with a seeming paradox: on the one hand, political justice seems generally to reflect a fragmentized political system, but, on the other hand, we find it in a highly integrated, homogenous polity as well.

Professor Kirchheimer's response would undoubtedly be that the preservation of "judicial space" in the American system removes judicial review from the range of political justice. This is not entirely satisfying. However, after mentioning the 1949 New York Smith Act trial, the author himself says of the judge caught in such a situation, "Unable to afford what constitutes the most awesome as well as the most creative part of the judicial experience, the entertaining of a small but persistent grain of doubt in the purposes of his own society, he becomes merely the legal technician shuffling formulas to fit the purpose of the day."[7] If this seems an extreme example, one may nevertheless argue more generally that American society does trust its judiciary with the adjudication of high policy issues precisely because we are assured from the start that courts will confine their speculation to a relatively narrow range of value alternatives. As with the secure totalitarian regime which can begin to tolerate a neutral referee, we permit judicial space because we know fairly well in advance what courts are likely to do within that space. This of course suggests an eternal paradox of freedom in general: societies and regimes usually grant freedom when they are reasonably confident that individuals will exercise it in conformity with certain basic norms—in other words, when those receiving freedom are already *un*free in the sense of having been conditioned by common habit, custom, and ideology. Under other circumstances, the grant of freedom is a standing invitation to anarchy. One can surely say this without denigrating the difference between a consensus on values which emerges within or from society itself and a consensus imposed from overhead by force or indoctrination. Yet, whether we are thinking of individuals or courts, there remains a curious, inescapable relation between freedom and *un*freedom.

Against this background, the concepts of political justice and judicial space acquire a certain air of unreality. Perhaps the underlying issue is not so much between "legal" and "political" justice as it is between different kinds of politics. Perhaps indeed one can argue that *all* justice is political, but that we somehow choose to identify it as such only in certain circumstances. One possible hypothesis might be that these situations usually involve some basic challenge to existing social and political order. If this is at all plausible, perhaps we can begin to see the point of convergence between the two approaches to political justice suggested here—the configuration of history and the continuum of judicial space. Clearly "magnanimity" toward political dissent in the latter

7. P. 233.

part of the 19th century reflected the relatively secure establishment of the bourgeois nation-state. Equally clearly, the social and political order which that state embodied has been under continuing, fundamental challenge since World War I—under a challenge which has inexorably "politicized" an ever-widening range of human endeavor, including not only science and literature, but also the judicial processes through which men seek justice. Professor Kirchheimer dedicates his book to "the past, present and future victims of political justice." Victims there are. But in a deeper sense, they are victims not simply of subversion control laws and drum courts, but of an as yet undetermined sea-change transformation in the structure of nations and societies.

VINCENT E. STARZINGER†

ANCIENT ROMAN STATUTES. A translation with Introduction, Commentary, Glossary and Index. By Allan Chester Johnson,[1] Paul Robinson Coleman-Norton,[2] Frank Card Bourne.[3] General Editor, Clyde Pharr.[4] Austin: University of Texas Press, 1961. Pp. xxxi, 290. $15.00.

THIS volume contains translations of 332 chronologically arranged texts prepared by a team of classical scholars and forms the second step in the ambitious project of publishing a translation of all the source material of Roman Law. The first volume is Professor Pharr's translation of the Theodosian Code.[5] The editors report progress with Justinian's *Corpus Juris Civilis*. It should be said at the outset that the physical form of this volume is of a very high order and most creditable to a University press.

The title is somewhat misleading. Many of the texts are *leges* in the strict legal sense of comitial legislation and a great many more are within the extended (and perfectly justified) definition of *lex* in the Glossary.[6] But likewise there are many documents of a judicial and administrative nature which are very far from legislative in character.[7] In this connection it is important to notice the criteria of selection which the editors have adopted. These are set out in their Introduction and expressly exclude, *inter alia*, illustrations of applied law or *negotia*, and texts quoted in imperial codifications. Though neither exclusion is in fact complete, this last self-denying restriction has entailed the exclusion of much that one would otherwise expect to see—the *lex*

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5. THEODOSIAN CODE (Pharr ed. 1952).
6. P. 267.
7. *E.g.*, p. 124, Doc. 147 is a *cognitio* of Augustus on a homicide appeal where the issue concerned the criminal liability of the owner of a slave who dropped a chamber pot on the head of the deceased when the latter was attempting to break into the defendant's dwelling.

POLITICAL JUSTICE; The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. [Princeton University Press; London: Oxford University Press. 1961. xiv and 452 pp. (with index). 68s. net.]

GTR

THIS is an important book. Although much has been written on political justice and many aspects of it have received close study I am not aware that any full length study of it has previously been made, at any rate in English. The book, as appears from its sub-title, is concerned with the interplay of politics and law, or rather of politicians with the lawyers of whom they make use for the purpose of overcoming their political opponents. The author is exceptionally well equipped for his task, to which he brings a wide general culture, long experience of the working of an important civil law system (that of Germany during the inter-war period, a time of considerable tension), and a subsequent career of distinction as a professor of political science at Columbia University.

Politics and justice are uneasy, indeed unhappy, bed-fellows. To the layman political justice is a contradiction in terms, and few lawyers would disagree with this opinion. Moreover, most people would say that there never has been a time when political injustice was more rampant and blatant than it has been in the present century. Professor Kirchheimer's study is mostly concerned with the history of our own times, but his book frequently harks back to earlier periods, even as far as classical Greece and Rome, and what he has to say about those ages suggests that we in our time have been no worse off, indeed perhaps rather better; for over the years methods of tempering the wind to the shorn sheep have been perfected, and have come into more widespread use, however sporadic and fitful this may have been. Moreover, difficult as it may be to pierce the fog of propaganda and counter-propaganda, the fact that the eye of the world is easily turned to any area in which injustices are alleged to be occurring is undoubtedly not without its effect. Thus, when the International Commission of Jurists issues one of its reports the Press coverage is very wide, and the reactions of the parties reported upon show a noteworthy sensitivity to criticism.

In theory, political justice is concerned with the protection of the state against its internal enemies who may of course include external foes who have planted themselves within the territory of a state for ease of operation. In practice, of course, a social class which has secured power, or even a set of

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party politicians, may equate themselves with the state for purposes of protecting their own interests. It is naturally the second type of political justice, in practice almost invariably unscrupulous, and often cruel in addition, which attracts the hostility of the historian or the contemporary critic. But actually the worst excesses have often occurred with the support of the mass of the community at times when a state has in fact been in peril; for the maxim *salus populi suprema lex* is apt to give *carte blanche* for oppression, and Professor Kirchheimer gives many instances of this.

The analysis is divided into three major sections. In the first the author is concerned with the actualities of political justice which in effect centre round the destruction or weakening of opposition groups, either by bringing the leaders to trial or repressing them, perhaps by flat-out methods, perhaps by sapping and undermining: these latter may be administrative, but more likely will bring in some semblance of legality, for as de Toqueville observed in a passage of profound insight which Professor Kirchheimer quotes at the very forefront of his work, the opinion of mankind grants authority to the intervention of courts even when the substance of justice has long evaporated from their operations.

The structure of state protection has varied a good deal down the ages, but in the era of constitutionalism it became pretty well accepted in modern states that regard should be had to legal process, and even in the totalitarian era lip-service has continued to be paid to this principle.

Professor Kirchheimer has some shrewd, if rather unkind, remarks to make about the attempts of conventional lawyers to evade the issue of the political trial by the contention that it is not to be differentiated from an ordinary criminal trial. He contends that the identical character of the procedure should not lead to confusion as to the objectives being the same. It might perhaps be said that the more liberal the state the more the two types of trial approximate, and certainly in England it is a narrow run of cases which could qualify for the distinction, since our political trials are now almost invariably framed under special statutes, sedition cases having become exceptional.

Professor Kirchheimer, however, has no difficulty in producing examples of political trials from modern liberal states. Thus he gives a fascinating account of how Clemenceau was able to immobilise his opponent Caillaux, the chief protagonist of a negotiated peace during the First World War, by an accusation of treason, never of course tried out.

More generally useful in liberal states because it does not require war, or near war, conditions to get it going, is the libel suit. To goad a political opponent into an action for libel is an old trick, and one for which left wing politicians should seldom, if ever, fall. Should they do so, they will not only imperil their own careers, but may well prejudice the political standing of the party to which they belong. The *Ebert* case, fascinatingly unravelled here, is a classical instance of this: it undoubtedly helped to bring the Weimar Republic and all that it stood for into disrepute. Professor Kirchheimer stresses how political propaganda can be magnified via court-room proceedings in a mass democracy where a cheap Press is at the disposal of the politicians conducting the offensive.

How the area of prohibited activity may be enlarged so as to bring opponents within the net of the law is shown in the next section; though the operators must be pretty wide-awake or the weapon may turn in their hands. This of course happened more than once with the Nazis.

Trials are not effective for these purposes unless held in public, or at any rate partly so. And in the modern period this means on a world stage where something may go wrong with devastating results. So on the whole the opposition parties will be repressed by other means. How far these other means should be legal, superficially at any rate, may be difficult to judge.

The various factors involved in such decisions are most interestingly analysed by Professor Kirchheimer in the fourth chapter.

In Part II, which is the longest in the book, the author deals with what most lawyers will regard as the most fascinating and worrying area of his subject; that is the personal part played in all this business by judges, lawyers, and others who are brought in to administer the so-called justice. Many aspects of this side of the matter, which will probably not have occurred to English lawyers, are brought out here, such as the peculiar vulnerability of most Continental judges, whose careers are entirely in the hands of the political administration, to pressure from that source. Professor Kirchheimer has much of interest to say on the subject of the selection and promotion of judges in the light of this political problem.

In totalitarian states the show of impartiality on the part of the judiciary is hardly maintained, and it is here where "democratic centralism" is the slogan that the most obvious injustices are apt to occur. Nevertheless, the situation is only superficially simple, and much light is in fact thrown upon "the nature of law and the judicial function" even in the unsavoury surroundings of Nazi and Stalinist repression.

In this section of his book Professor Kirchheimer devotes a great deal of space to a rather elaborate discussion of the legal activities of successor régimes. The increasing importance of the political trials held by victorious nations after wars, or by successful parties after civil wars, is in itself a recognition of the place which justice holds in the minds and hearts of men. Successor régimes have been sensitive to this, but they are even more sensitive to the need for the maintenance of their prestige. This means that the trials must result in convictions, at any rate in the more important cases. There has of course been a flood of argument on this subject since Nuremberg, and Western writers have tended to be apologetic about the whole business. Professor Kirchheimer in a moving passage puts the subject back where it ought always to have been, in the sphere of justice. We are searching, he says, "for a fundamental notion to which all groups and nations must at least submit, if not always subscribe. Respect for human dignity and rejection of the degradation of human beings. . . ." All that he has to say in this chapter is worthy of close attention.

Fascinating and thought provoking as are the earlier parts of this book it must be confessed that they make gloomy reading. In the third part we get some relief, for Professor Kirchheimer here discusses those elements which have from early times acted as a break in many of the worst periods of political injustice. I hope that I shall not be regarded as cynical when I mention that this is very much the shortest section of the book. The most important of these, legally speaking at any rate, is asylum. And it is characteristic of the author's wide-ranging scholarship that he introduces this subject with an incident from Herodotus. Asylum was of course well recognised in classical times, but legally it has always been a "perplexing subject." Recognition as a "right" in the Universal Declaration of Human Rights possibly enhances its prestige as an institution, but it may be doubted whether this has been of any real help to any one refugee, and as Professor Kirchheimer himself points out, changing concepts in relation to extradition have in the atmosphere of ideological struggle and the cold war done a great deal to weaken the value of asylum. In Great Britain, which formerly prided itself upon being a refuge for the politically oppressed, political defences to extradition applications seldom seem to succeed, and one feels that the old liberal attitude of our courts has been a casualty of the cold war, if indeed it had not become moribund in an earlier generation.

Clemency is of course another possible outcome of a political trial, and does in fact occur from time to time, though it must be confessed that it seems more likely to occur on the other side of the iron curtain than in the West.

However, it is not at all easy to assess the genuineness of the mercy element in the release by the Russians of such offenders as Gary Powers: clearly the political propaganda value of clemency in these cases is high, and Communist states seem to be much less merciful to their own nationals. On the other hand, it is unfortunately clear that from Sacco and Vanzetti to the Rosenbergs and Morton Sobell the record of the U.S. administration has been of the merciless type which one associates with fear, and a haunting doubt of the moral validity of one's case. *Homo hominis lupus.*

C.

page proof from SOCIAL RESEARCH - vol. 29, no. 1 - Spring 1962

BOOK REVIEWS

KIRCHHEIMER, OTTO, *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton: Princeton University Press. 1961. xiv & 452 pp. $8.50.

"The aim of political justice is to enlarge the area of political action by enlisting the services of courts in behalf of political goals." Political recourse to the courts occurs in a variety of circumstances. It involves, of course, a distortion of the judicial process; at the same time, the characteristics of that process supply conditions, some advantageous, some disadvantageous, to the pursuit of the political goal.

It would be hard to conceive a literary project more ambitious—or more forbidding—than an analytical study of political justice. There is needed first of all the mastery of a great mass of historical detail, for the study must rest on empirical data; and these data must be evaluated. The author must be familiar with all the legal systems involved in his data. But these needs are only the beginning. The events must be oriented in a historical scheme; they must also be made to yield a categorical analysis which exposes the necessities, the implications, and the consequences of political justice. Imagination and a high degree of creativity are required. All these conditions are met in the book under review. Some hundreds of cases contribute at one point or another to the discussion; several receive extended consideration. They simultaneously underpin and illuminate the historical and analytical treatments.

For most of human history the legal offense of disrespect for authority—the *crimen laesae majestatis*—has been punished as a matter of course. During the nineteenth century, in western Europe and the United States, where the ideal of constitutionalism had taken root, this "system of state protection" was "hesitant and conscience-stricken." Since the First World War, however, it has been restored to full vigor. The "crime of social dissolution," to adopt the expressive Mexican term, has been introduced almost everywhere. The French, German, and American codes are very elaborate; only Great Britain and some of the Commonwealth nations have adhered to the nineteenth century tradition.

In part social factors account for these changes. The outlook of the nineteenth century was that of the middle class. The middle class had made its gains through opposition to government, and still identified itself with dissent. Moreover, the middle class inherited the optimism,

the rationalism, and the attachment to certainty of the Enlightenment. For the first time there was a public opinion hostile to political justice. But today, in mass society, public opinion is uninformed, uncritical, and irrational; it applauds political prosecutions with enjoyment of the spectacle heightened by moral indignation at the victim.

Political factors also played a part. The nineteenth century saw the apogee of the national state. The tendency was toward indulgence of internal proposals of change; traffic with a foreign enemy was "the deadliest of all sins." But international communications have recast value systems in the twentieth century: economic interest groups, fascism, and communism have in their various ways deprived the state of its monopoly of loyalty. These very developments have produced more violent assertions of state patriotism on the part of the popular masses. The upshot has been the enactment of penal legislation which identifies the ideological crime of social discontent with aid to a foreign enemy. The imprecision of the concept of "subversion" makes possible the conflation of the two offenses, and its vagueness makes the word more sinister and menacing.

But these illuminating historical insights are a side-issue. The principal concerns of the book are to establish types of political justice and to examine the constituent elements of the political trial. The most obvious case of political justice is the bill of attainder, the outlawry of a dissident group. When a ruling minority undertakes to destroy popular organizations, there is usually no ulterior purpose; the goal is simply repression of opposition. Execution of the political policy collides at points with the legal order, which the government is unwilling to scrap altogether; even the opponents of the racial laws of South Africa have found some shelter behind the structural beams which are necessary to support any legal system. But most contemporary acts of repression—the American anti-communist legislation, and the suppression of the Socialist Reich Party and the Communist Party in West Germany are considered in some detail—are not intended to protect the regime from any real threat. The American legislation resulted from a competition in demagoguery. The Socialist Reich Party was suppressed for no other reason than its insolent behavior. The suppression of the Communist Party by the German Constitutional Court was principally intended to buttress the foreign policy of the government.

Other forms of political justice do not involve the proscription of a group by name. Statutes of a more conventional sort are passed prohibiting one or another action, speech, or opinion; or the defend-

Reprinted for private circulation from
THE UNIVERSITY OF CHICAGO LAW REVIEW
Vol. 30, No. 1, Autumn 1962

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

What is Political Justice? In a sense all administration of justice, criminal and civil, is political, as it serves to maintain and at times to change, the social and political order of society. Kirchheimer deals with political justice in its more specific sense—the use of the law and the courts directly to influence the struggle for political power. Even in this narrower sense the term refers to a wide variety of phenomena, ranging from the judicial prosecution of the alleged revolutionary or traitor to the use of the courts by the political opponent who forces a member of the governing group into a defamation suit. This variety of forms in which political justice can appear is vividly illustrated by the author in the opening chapter of his book, in which he presents a concise historical survey and a detailed description of some typical political cases of recent times. The use of an accusation of common crime to discredit or destroy a political opponent is illustrated by the attempt of the Kentucky Democrats in the 1890's to wrest the governorship from the Republicans by preferring a specious murder charge against the Republican leaders. The story of this long forgotten, but by no means atypical, episode of American politics is instructive as well as thrilling. The equally specious, but successful, attempt of Clemenceau and Poincaré, through a treason charge to prevent Caillaux from attaining political power during World War I, and from using it to bring about a compromise peace, stands for what may be called political justice in its purest form. How a regime can be undermined by forcing a member of the governing group to defend himself against libelous charges before a judiciary sympathetic to the libellant's cause is demonstrated by the case of Friedrich Ebert, first President of the German Republic after the collapse of the monarchy.

While trial can thus serve as a weapon of attack, it is more frequently a weapon to defend an existing regime or government against its opponents. Political justice is a typical weapon of what Kirchheimer calls "state protec-

tion," meaning the protection of the regime or government in power. It is not the only weapon. A government may dispose, and often enough has done so, of its real, suspected or manufactured enemies without interposition of the judiciary. Administrative arrest and protective custody in a concentration camp are but illustrations from our own times. They have been used not only by fascist, national-socialist or communist regimes, but during World War II by Great Britain and the United States.

Observing political justice as a means of state protection leads Kirchheimer into a discussion of state protection in general, especially the dilemma that presents itself to the modern liberal-constitutional state where it is, or believes itself to be, in serious danger from an "opposition of principle," especially by opponents of the very bases of democracy, constitutionalism and individual liberty. Such enemies, in our days fascist and communist, want to make use of those very liberties of democracy which they are bent to destroy. How far can a democratic state go in its efforts to protect itself against such enemies without destroying its own foundations? How can state protection be squared with freedom of speech? What Kirchheimer has to say on this disturbing problem stands out among the mass of recent writing. Here, as in all other parts of his book, Kirchheimer draws on vast material taken from many parts of the world. The radical measures of the Federal Republic of Germany, finding itself directly confronted with efforts of communist penetration from East Germany, are contrasted with the cavalier attitude of Great Britain, believing itself to be immune. The vacillating, and at times frantic, American outbursts are shown to be due less to real danger than to politicians' attempts to ride a probably overestimated wave of popular fear and insecurity. Kirchheimer believes that at least some of the American advocates of radical measures may have felt that the harshness of their legislative proposals would be softened, or even declared unconstitutional, by the courts. To some extent this expectation has indeed been borne out, especially through the attitude taken by the United States Supreme Court in *Yates v. United States*.[1] That case has not been the last word in the political struggle about anti-subversive legislation. In later cases the Supreme Court itself has taken a more rigid approach, and local courts have frequently tended to lean in that direction.

Reviewing the broad scale of attempted state protection in the past and present, Kirchheimer reaches the conclusion that most of the measures are unnecessary where the opponents are insignificant, and that they are, in the long run, ineffective against an enemy representing the majority of the people struggling against a governing minority regime or a colonial power. In such generality this judgment appears too broad. It applies only to liberal constitutional regimes that have opened themselves to democratic ideology and lost faith in the justifications of their own rule. In our days such softening has gone so far as to result in the voluntary abdication of colonial rule. But where

[1] 354 U.S. 298 (1957).

there is a strong will to maintain power, minority regimes have been able to survive attacks from within as long as they have not been accompanied by defeat by the external enemy. The Czarist regime of Russia even managed to survive the defeat by Japan in 1905; it did not fall until the total defeat by Germany in 1917. Austria-Hungary survived all attacks by Czech, Yugoslav and Italian nationalists until the defeat in World War II. If, along with Kirchheimer, one regards pre-World War I Germany also as a country where a majority of the people was lorded over by a minority, it might be added as another illustration. However, the German example tends to indicate that the dichotomy, minority-majority, may be too simple. Not even the Social-Democratic Party which, as a matter of fact, never achieved a majority vote, constituted in its totality an opposition of principle. A government may well be drawn from a minority of the people and the majority may be content with, or at least acquiesce in, that situation. The futility of the half-hearted German attempt of the 1880's to suppress the Social-Democratic Party can indeed be used as a prime example of the problematic relationship between liberal constitutionalism and efforts at state protection. The German case does not constitute an example of the futility of vigorously attempted state protection against a popular majority. Neither was the majority opposed to the existing system, nor did that system ever undertake a full-fledged effort at determined suppression of even its declared enemies. Such an effort, if it had ever been undertaken, might well have run into trouble not only because it would have been contrary to the political climate of liberalism, but also because it could hardly have expected the full co-operation of the judiciary, which, as shown by Kirchheimer's own illustrations, was little inclined to harshness against such leaders of opposition as Bebel and Liebknecht.

Neither in Germany nor in the United States or other non-totalitarian countries have the courts corresponded to that communist over-simplification in which they appear as mechanical tools of the government—both government and courts simply constituting weapons of the ruling class in its struggle to keep down the exploited class. Neither, of course, have the courts been the never-flagging champions of individual freedom against governmental suppression, as they have occasionally appeared in Anglo-American oratory. Reality is more complex. Its sociological analysis by Kirchheimer is penetrating. Why do governments resort to courts at all? Why do they run the risk of being rebuffed by the courts and the danger of the political trial being used by the accused and his group as a public forum of the potentially highest efficiency?

These questions are answered by Kirchheimer in a searching analysis of the role of courts not only in political trials but in society in general. Obviously influenced by Max Weber, Kirchheimer finds the key in the deep human need for justification of the use of power. In order to be accepted, and thus to be stable, power must be felt to be "legitimate," *i.e.*, to correspond to postulates

accepted as self-evident. In our age, in which the exercise of power, in order to be accepted as legitimate, must be demanded by, or at least correspond to, reason, the reasonableness of the exercise of governmental power must be visibly demonstrated. This task of legitimizing in individual cases the exercise of governmental power, especially when it is directed against an alleged enemy, falls to the courts; the judges are the legitimizers of the exercise of governmental power. This insight proves itself a veritable key to the clarification of the problematic role of the judiciary in the political fabric.

Courts cannot serve as legitimizers of governmental power unless they can follow their own judgment independent of the views of the government. Here then lies the root of the democratic postulate of an independent judiciary. But, on the other hand, no state could survive a decided hostility of its judiciary against its government. A dramatic illustration of such a case is afforded by the German Weimar Republic. Hence the problem of finding the right balance between judicial independence and judicial obedience to the law. No hard and fast solution can be stated. The answer must depend on varying circumstances of time and place. How great the variations have been in the measure of success, and how manifold are the available means of formal and informal nature, is extensively shown by Kirchheimer. Modes of judicial appointment, tenure, appeals, administrative controls, personal background, relations to the public, both in general respect and in special relation to the political case, all come under scrutiny. The inquiry is extended to the role and position of the other actors in the judicial drama: the prosecutor, the attorney and the accused. For the accused the political trial can present a much desired opportunity to publicize, dramatize and propagandize his cause and thus to defeat the very enemy by whom he is prosecuted. But promotion of the cause may be fatal to him. Shall he save his own skin by turning informer or traitor to the cause? The dramatic dilemma is illustrated by numerous contemporary cases as well as by the two most momentous political trials of our history, those of Jesus and Socrates.

What are the peculiar tasks of defense counsel in the various types of political trial? Is it his first task to serve his client, or is he to promote the cause? The two tasks can be incompatible.

What, furthermore, is the role of the prosecution? How is the prosecutor's position to be organized if it is simultaneously to serve the government and not to compromise the people's confidence in the administration of justice? What are the motivations for the decision of whether or not to prosecute, and, in the affirmative situation, of how to "dress up" the case?

All these problems are discussed on the basis of a large amount of material taken from constitutional countries such as the United States, Germany, Switzerland, France, Great Britain and South Africa. But how do the problems present themselves in a totalitarian country? The German Democratic Republic (*i.e.*, East Germany) serves as a richly documented illustration of the

several techniques—formal and informal, crude and subtle—for the achievement of a situation in which the courts, like all other organs of state and party, are to function as reliable executive organs of an all-powerful regime bent upon remolding an entire people in accordance with an ideology regarded as ultimate truth. This fascinating description is followed by a survey of turns in Soviet theory on revolutionary legality, which, however, does not extend to those latest tendencies which may conceivably foreshadow a considerable intrusion of lay elements into the administration of Soviet justice and, perhaps, a growth of judicial independence.

A chapter of some fifty pages is devoted to "trial by fiat of the successor regime," amply illustrated by cases from widely diverse places and periods. The trial of representatives of the defeated by the victorious regime appears to be a common, and probably inevitable, phenomenon. Kirchheimer uses the case to explain the essential difference between the trial and the action which for propaganda purposes is called a trial but partakes more of the nature of a spectacle with prearranged results. But even in such administration of justice, gradations exist. In the courts-martial of the Vichy militia and the people's tribunals of the first liberation days, enemies, whose fate had been settled in advance, were butchered. The liberation type of *cour de justice*, with all its prejudices, allowed for some primitive rights of defense. The elaborate military commission set up by the United States for the trial of such Japanese "war criminals" as General Yamashita is said to constitute a marginal case. The Nuremberg trial before the International Military Tribunal is regarded as a true rather than a merely simulated trial. The Nuremberg case is extensively discussed, but, in contrast to the general character of Kirchheimer's inquiry, the refutation of the critics moves more along legalistic than political lines. Whether Nuremberg has produced, as Kirchheimer hopes, the positive result of a lasting condemnation of the use of inhuman practice in the political struggle may well be doubted. As pointed out by the author himself, the Nuremberg indictment was directed primarily against the National-Socialists' attempt to subjugate Europe by force of arms, and only incidentally against the practices used in the pursuit of this aim. Inhuman acts unconnected with the war were expressly excluded by the Tribunal from its scope of jurisdiction. More convincing, on the other hand, are Kirchheimer's arguments against the proposals to call in neutral judges in the condemnation of the National-Socialist rulers of Germany by their Allied successors, or to leave their condemnation to German courts.

In the chapter following, Kirchheimer investigates the role played in political justice by the corrective institutions of asylum and mercy. Asylum signifies the limitations imposed on political power by the limits of its territorial spheres. What are the considerations motivating a government to grant or to refuse asylum? What were the policies of the several nations in the nineteenth century, when the asylum seeker was typically an individual? What are

they today when the search for asylum has come to be the concern of vast groups of persons persecuted not only on grounds of political creed or activity but on grounds of nationality, race or social origin?

What, finally, are the complex and widely varying motives for granting or denying mercy to individual victims of political justice, or amnesty to entire groups? The comparison of Lincoln's practices with those of contemporary American administrations is as fascinating as the analysis of attitudes of Shakespearian characters, of Tudor and Bourbon kings, or of successive French and German regimes.

In summing up Kirchheimer returns to the comparison of political justice in constitutional and totalitarian regimes. In the former the existence of a "judicial space" is essential if the "detour" of the resort to trial is to fulfill its function of legitimating the governmental prosecution of the political foe. Only if the courts are left a space of freedom to exercise their own, though perhaps narrowly defined, judgment can political justice be expected to achieve its assigned end. There must be some risk of divergency between government and court, and thus some risk of the trial being used by the accused as a forum for effective advocacy of his cause. Where no such judicial space is left, the political trial can serve only the different functions of a potentially highly effective means of a totalitarian government to educate the populace along the ways desired. Whatever the regime, political justice "is bound to remain an eternal detour, necessary and grotesque, beneficial and monstrous."[2]

This final judgment expresses the well-balanced nature of Kirchheimer's investigation of a topic that easily provokes partisan approach. Kirchheimer leaves no doubt about his own convictions as those of a democratic, liberal constitutionalist. But through his comprehensive knowledge of history he is familiar with the complexity and inevitability of the problem. He pursues it not as the pleader of a cause but as a scholar in search of knowledge and understanding.

Kirchheimer is a political scientist and a sociologist. He looks at the phenomenon of political justice from this outside point of view rather than from the inside position of the lawyer.[3] It is exactly this approach that makes his work fascinating and important for the lawyer. The impact of the inquiry is due not the least to the comprehensive scope of the author's material. Political justice has been treated in a flood of writing, especially in recent years when it has become such a widespread and disquieting phenomenon. The number of American discussions of American cases, practices and problems has been legion. Nowhere else can the reader find such a wealth of material as in Kirchheimer's book. Consequently, the approach is from a higher level; phenomena and problems of one country are reflected in those of another. Thus new light is thrown upon the familiar phenomenon. The inquiry cuts down

[2] P. 430.

[3] The fact that the author is not a lawyer has found expression in his unorthodox and at times annoying mode of citing cases, American and foreign.

to fundamentals. The book constitutes a high achievement of comparative law as well as of jurisprudence. Law teachers might well consider its use as a base for discussion in seminars or courses on jurisprudence. For one striving at clarifying his thoughts about the problem of how to defend our social and political system against its enemies, without in the effort undermining its very foundations, Kirchheimer's book is, I dare say, indispensable. To the judge, attorney, or prosecutor involved in a political case, it will serve as a useful practical guide.

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KIRCHHEIMER'S *POLITICAL JUSTICE*

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REPRINTED FROM

NATURAL LAW FORUM Vol. 8 (1963)

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POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURES FOR POLITICAL ENDS. By Otto Kirchheimer. Princeton, N.J.: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

The idea of a book on political justice excites the mind to questions and perplexities. Perhaps chief among them is whether the discipline of law can tame the unruliness and opportunism of the political game. Or must politics inevitably gain the upper hand and subject the law to unseemly indignities by impressing age-old doctrines and procedures into new and unfamiliar service?

"Political justice" is not used in this book in the sense of an ideal order of government in which all citizens communicate with the body politic to assure its highest perfection. Rather it is used to define that segment of law in which the devices of justice are used to bolster or create new power positions against real or imagined enemies of the state. The author explains that the book is neither a history of political justice nor a collection of its most noteworthy cases, thus explaining the absence from its pages of such a cause célèbre as the Dreyfus case. The book is designed to expose the underlying mechanisms of political trials by relating their political content to the juridical form in which cases take place.

Professor Kirchheimer, a native of Germany and now a professor of government at Columbia University, has lavished comprehensive and painstaking research on his subject in the tradition of good European scholarship. He has capitalized on most of the opportunities presented by the vast field he surveys. Although the book is flawed by meandering and by a heaviness of language, it strikes this reviewer as a highly valuable contribution.

The ambitiousness of the project is easily appreciated by its range of problems: When will a regime find it necessary, possible, or convenient to resort to the judicial process for political ends? How do the actors in political trials — judge, jury, prosecution and defense counsel — respond to their new roles as they are willy-nilly thrust in the spotlight of conflict for political advantage and power? What part is played by the supporting cast of informers, collaborators,

defectors, and security police? To what degree can political justice enable a regime to "legitimize" its status, marshal public opinion to its ideology and objectives, and dispose of its enemies? How do clemency and asylum mitigate the consequences of political justice? Finally, in what circumstances, if any, can resort to the courts to validate political goals be justified in normative terms?

A basic question is whether political trials can be distinguished from the usual run of judicial business. Do not all questions of tort and contract, not to mention constitutional law and labor law, ultimately involve adjustments between competing social and economic forces, and are not such adjustments what politics is all about? Kirchheimer handles this question skillfully. Recognizing that most trials may harbor long-range socioeconomic effects, he nevertheless argues persuasively that there is a critical difference between the usual courtroom conflict and those cases in which the judiciary is called upon to exert immediate influence on the distribution of political power. In such cases, the trial serves to advance or harm the interests of a definable political group. To elucidate the distinction, he points to the differences between a perjury trial growing out of alimony proceedings and one turning on statements made before the House Committee on Un-American Activities; between a homicide trial of a doctor's wife in Cleveland and a trial for the murder, after a hotly contested campaign, of a candidate for Governor of Kentucky; and between a trial for conspiracy to rob a bank and a trial for conspiracy to advocate the overthrow of government by force and violence.

The most solemn and far-reaching political cases — indeed, cases which throughout history have tested and tormented established governments — arise when a regime turns to the courts for assistance in repressing hostile political organizations. The author introduces this theme by lengthy comparative treatment of the varying conclusions reached by the Western countries as how best to proceed against domestic Communist movements after World War II. While Germany and the United States in different ways employed the courts to combat the Communist Party, France and Italy resisted this temptation but discriminated against the Party in the administration of election laws and within the parliamentary system. Great Britain and the Scandinavian countries resorted to neither of these forms of repression, but consistently adhered to a "policy of equal treatment" for all political groups.

Kirchheimer valiantly attempts to derive the causes for these disparities of policy. As one might expect, they are complex. A nation's cultural traditions and transitory leadership both play a part. But hard political facts more often lie at the root, including the strength of the Party within each Western country and the likely reaction of the mass of people to different policies. Open repression must risk, apart from the uncertainties of trial, the revulsion of former friends from a pattern of persecution, the martyrdom of victims, and the consequences of driving opposition underground. Displaying erudition and a shrewd political sense, Kirchheimer provides telling insights into the manipulation of means to cope with domestic movements believed a threat to stability. It is not to detract from these insights that this reviewer suggests that neither history nor what we have been able to learn of the nature of man supports

the author's conclusion that "legal repression of democratic mass movements is bound to be futile in the long run." (p. 171) Throughout recorded history, exactly such repression has taken place, and the hegemony of "democratic mass movements" still remains mostly a dream. In addition, it must be said that not everyone is interested in the long run, and this perhaps explains the undiminished ardor with which such repression is widely attempted.

Since finally the trial's the thing, it is to it that we turn with special interest. In such high drama no participant is immune from the severe psychological strain of resolving the inconsistent pulls of duty, fairness, and self-interest. Whether the trial is in France, Germany, the United States, or elsewhere, there is a judge torn between the duty of impartiality and the pressures to vindicate fundamental political goals of a regime from whose establishment he is recruited; a prosecutor weighing political as well as legal risks every step of the way, from the initial, tough decision whether to prosecute at all to the recommendation of appropriate punishment after conviction; and a jury, historically a buffer between the state and the accused, but here acting under manifold compulsions to sustain the state. The agents of the state are not alone in finding themselves in awkward roles. At every turn the defendant will ponder his legal and political objectives; that they are often in reciprocal relation will mean that one or the other must be sacrificed. Defense counsel, too, must face some hard facts. If he is part of the apparatus of the prosecuted political party, the political goal of preserving the public image of his cause may create legal risks to both client and lawyer;[1] on the other hand, if he does not share the politics of his client, he frequently will endure the irony of public obloquy for services rendered to a national enemy, while in fact he may be responding to subterranean needs to vindicate the regime.

After all concerned play out their roles, it is the judiciary who must make an ultimate determination concerning the legality of a political group or of governmental action designed to curb it and its membership. This decision ordinarily involves an estimate of the purposes and strength of the group matched against the power and determination of the existing government. The decision thus becomes, in the words of the late Justice Jackson, "a prophecy . . . in the guise of a legal decision."[2]

The degree to which the judge has authentic intellectual independence in reaching a decision will vary, of course, with political conditions. All executives move to destroy what Kirchheimer calls "judicial space" — the uncertainty of result in political trials. Such uncertainty was completely wiped out in the show-trials of Hitler's Germany and Stalin's Soviet Union, where the judge acted purely as the political agent of the regime. But even in democratic coun-

1. The legal risks to the client are well known. But the lawyer's troubles after trial may be virtually as painful. See Sacher v. United States, 343 U.S. 1 (1952) (criminal contempt conviction of counsel for Smith Act defendants upheld), Sacher v. Association of the Bar, 347 U.S. 388 (1954) (permanent disbarment set aside as too severe); In re Isserman, 9 N.J. 269, 87 A.2d 903 (1952) (another counsel for Smith Act defendants disbarred in New Jersey), In re Isserman, 345 U.S. 286 (1953) (disbarment sustained by Supreme Court by evenly divided Court), set aside on rehearing, 348 U.S. 1 (1954). See also In re Sawyer, 360 U.S. 622 (1959).
2. Dennis v. United States, 341 U.S. 494, 570 (1951).

tries the judge acts within a narrow compass when the enemy of the state sits in the dock and the engines producing national conformity are open full throttle.

That "judicial space" is compressed in the United States will be apparent to anyone who inspects the opinions of the Supreme Court sustaining, for example, the convictions of Eugene Debs and Benjamin Gitlow after World War I[3] and of Eugene Dennis and Junius Scales a generation later.[4] That some "judicial space" remains, however, perhaps more than commonly recognized, is apparent from decisions limiting the inquisitorial license of legislative committees[5] and other decisions cutting back the executive's power to utilize political grounds to deport aliens,[6] restrict travel,[7] and strip individuals of citizenship.[8]

Ward politicians and political science purists alike may balk at the concept of "judicial space." Politicians because they know that everyone must "go along," even if he is a judge ("How else did he get the job?"). Purists because they may regard a catchy tag line for a familiar theory of the nature of freedom superfluous and confusing. Vincent Starzinger suggests this point in an excellent analysis of the book under review:

> . . . American society does trust its judiciary with the adjudication of high policy issues precisely because we are assured from the start that courts will confine their speculation to a relatively narrow range of value alternatives. As with the secure totalitarian regime which can begin to tolerate a neutral referee, we permit judicial space because we know fairly well in advance what courts are likely to do within that space. This of course suggests an eternal paradox of freedom in general: societies and regimes usually grant freedom when they are reasonably confident that individuals will exercise it in conformity with certain basic norms — in other words, when those receiving freedom are already *un*free in the sense of having been conditioned by common habit, custom, and ideology.[9]

Is political justice ever acceptable? Kirchheimer adduces two possible justifications: (1) political justice may be harmless, as when the purpose is to bolster the public image of a regime or to put an official stamp on the already achieved defeat of a political opposition, or (2) the alternative to political justice may be worse, as when a regime would act more arbitrarily and perhaps violently if it had no recourse to the courts.

But these justifications will not wash. For political justice can never be harmless when the result is to send a man to jail or when the merits of

3. Debs v. United States, 249 U.S. 211 (1919), Gitlow v. New York, 268 U.S. 652 (1925).
4. Dennis v. United States, 341 U.S. 494 (1951), Scales v. United States, 367 U.S. 203 (1961).
5. Watkins v. United States, 354 U.S. 178 (1957), Sweezy v. New Hampshire, 354 U.S. 234 (1957).
6. Rowoldt v. Perfetto, 355 U.S. 115 (1957). But see Harisiades v. Shaughnessy, 342 U.S. 580 (1952), Galvan v. Press, 347 U.S. 522 (1954), and Niukkanen v. McAlexander, 362 U.S. 390 (1960).
7. Kent v. Dulles, 357 U.S. 116 (1958), Dayton v. Dulles, 357 U.S. 144 (1958).
8. Nowak v. United States, 356 U.S. 660 (1958), Maisenberg v. United States, 356 U.S. 670 (1958).
9. Starzinger [Book Review], 71 YALE LAW JOURNAL 1364, 1368 (1962).

a particular government are sold to the citizenry like a cake of soap or a compact car. The second justification is not capable of proof because there is no valid way of estimating a regime's response to political opposition if it lacked the opportunity to implicate the judiciary. Indeed, the trappings of legality may facilitate repression by enabling more people to overcome scruples.

It may be objected that to dispose of these two lines of argument does not dispose of the problem. Need a regime sit idly if it is sincerely convinced that a political conspiracy will use force to destroy it, and are not the courts the most available and decent forum for state defensive action? This has been proposed as the testing case for those who deplore the use of the judiciary for political ends.

A response must initially draw the line between political conspiracies that have resorted to violence and those that are yet inchoate. As to the former, there would seem an inherent right of self-defense, as well as the right to judicial enforcement of laws designed to punish acts of insurrection. The real question is how to handle conspiracies that are in the talking stage. As to these, one must for himself accept or reject Kirchheimer's conclusion that political justice is fundamentally inconsistent with "the essence of the . . . democratic political system, [that is,] majority rule with unconditional protection of minorities, including the right to turn into a majority." (p. 169) Kirchheimer's premise, of course, is that if a minority is disposed to act through force rather than ballots it will be time enough to thwart such action when it occurs; in the meantime, the political process should be open to all points of view, and let the chips fall where they may. The alternative course of proceeding against a conspiracy before it acts violently not only imposes intolerable burdens on the judicial system, but also opens the door to elimination of political enemies through the convenient self-delusion that force is inevitable and imminent.

But will there be time for successful defense when the enemy finally strikes? The answer to this highly practical question may not be the same for all governments and for all times. The period since World War II provides material for arguments on both sides. The coup d'etat in Czechoslovakia may be thought to illustrate the perils of leaving jail cells empty for too long. On the other hand, an observer of the American scene can conclude that there has been insufficient risk of violent overthrow of government to justify the political trials under the Smith Act and the McCarran Act.

Kirchheimer believes that when a regime resorts to the courts for political ends it is responding to the twin spurs of fear and self-doubt. The dedication of the present volume to "the past, present and future victims of political justice" suggests the author's conviction that these motivations will continue to induce governments to contain domestic enemies with the aid of the courts. Those devoted to freedom will join Kirchheimer in regretting this, while recognizing at the same time that the problem is many-sided and subtle, and that the absolute undesirability of invoking political justice has not yet been justified logically or historically, and perhaps cannot be.

NORMAN DORSEN

POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By Otto Kirchheimer. Princeton: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

This book is not, as its author makes clear primarily for the benefit of his audience in this country (where the term "political justice" is not in common use), a search for "an ideal order in which all members will communicate and interact with the body politic to assure its highest perfection."[1] It is instead a thorough, indeed, exhaustive analysis of almost every aspect of what is popularly known as the political trial, that political phenomenon characterized by the "power holders'" use of the "devices of justice to bolster or create new power positions," or to persecute or silence their enemies.

Every regime (the author uses the term in a sense very close to the meaning of its original Greek equivalent) has its domestic enemies and, therefore, faces the problem of dealing with them; and one way of dealing with them, which is the concern of this book, is to proceed against them in the courts. Legal proceedings may take the form of a libel action, a prosecution under a sedition act or under a "nonpolitical" criminal statute (such as the *Reichstag* fire trial), a contempt citation, or even a refusal by a committee on character and fitness to grant admission to the bar. They may involve one person only (Socrates or Jesus), a political party in its entirety, or, as in the case of the Moscow purges of 1938, an allegedly anti-party group; they may represent no more than a political leader's desire to defeat a policy proposal by eliminating its advocate (Poincaré and Clemenceau's charge of treason against Caillaux), a minority's attempt to deny power to a rising majority, an attempt by the victors in war to punish the vanquished instigators of that war, as in the case of the Nuremberg trials, or a political trial in the era of mass communication, the purpose of which is to bolster domestic morale, as in Ben Gurion's desire to use the Eichmann trial "as the focal point for Israel's self-assertion before continuing threats to its existence . . . ."[2] In the most interesting, or at least most troublesome, case, a majority may resort to political justice to repress the opinion held by a "deviant" minority. It is the variety of these conditions—of motives, participants, and settings—that furnishes Professor Kirchheimer with the materials for his analysis. The result is truly impressive scholarship and a major contribution to our knowledge of almost every conceivable aspect of the phenomenon.

But an analysis of "political justice" must take place, inevitably one would think, in the setting of a larger question: how to bring about and maintain those conditions that facilitate the achievement of at least an approximation of political justice understood precisely as an "ideal order in

1. P. vii.
2. P. 18.

which all members will communicate and interact with the body politic to assure its highest perfection."[3] The vast number of such trials, extending in time from Socrates to Eichmann (who had not yet been sentenced when this book was published), and occurring in countries marked by tolerably decent regimes as well as those ruled by the cruelest of tyrants, suggests that political justice is one aspect of a problem that is coexistent with political life. Is there no place in the pursuit of a just society for the political trial that leads to banishment, denial of asylum, deprivation of privileges, or even a prison sentence? Is the character of the regime in the name of which the trial is held and of the opinion that is repressed of no relevance to an analysis of the phenomenon? Or is repression in every case not "a matter of rational choice," but an "elaborately rationalized expression of a deep-seated human need for aggression, violence, exercise of power, and aggressive domination?"[4] Professor Kirchheimer seems to answer these questions by his dedication of the book "to the past, present, and future victims of political justice."

But these victims include Eichmann and Goering, Hess and the others at Nuremberg, as well as Socrates and Jesus. Does the author intend to include them all in his dedication? Probably not, as he concludes his discussion of the Nuremberg trials by saying: "But while it retained many overtones of the convenience type of trial, did the Nuremberg trial, with all the hypocrisy and grotesqueness deriving from its very subject, not belong very profoundly in the category of a morally and historically necessary operation?"[5] Some political trials prove to be justified, despite their dubious legality. Would this be true of a trial of such men before they seize power, a trial based on a duly promulgated law before a tribunal whose jurisdiction is unquestioned? Could it not be said that the American Smith Act prosecutions and the German Federal Republic's repression of its Communist and Socialist Reich parties were also morally and historically necessary? Surely not, if, as Professor Kirchheimer suggests, when it is "foreseeably effective, repression seems unnecessary [and] when advisable in the face of a serious threat to democratic institutions, it tends to be of only limited usefulness, and it carries the germs of new, perhaps even more menacing dangers to democracy."[6] But his judgment seems to rest less on repression's questionable effectiveness (on this point the Federal Republic appears to be guided by the failure of the Weimar Republic to act against its enemies) than on his view of constitutional democracy, the essence of which is expressed in the principle of "equal rights for every man," and of the democratic political system with "majority rule with unconditional protection of minority rights, including the right to turn into a majority."[7] If this is constitutional de-

3. P. vii.
4. P. 172.
5. P. 423.
6. P. 172.
7. P. 167.

mocracy, then a policy of repression of any political opinion, however ineffective as a policy and however moderately pursued when compared with the political trials conducted by the Nazis and Communists, is necessarily undemocratic. Indeed, it is difficult to understand how any political *opinion* could be undemocratic. Yet Lincoln regarded the opinion that slavery was neither right nor wrong as contrary to the principles of the American democracy; and Jefferson campaigned for the presidency in 1800 on the platform that Federalism was subversive of the Republic, and in his *Notes on Virginia* advocated the exclusion of monarchists, who were not able to offer the kind of consent that would qualify them to participate in free government, and even some of the refugees from monarchies who, he thought, would have anarchistic sentiments. In fact, American democracy as understood by Jefferson and Lincoln would rightly regard some opinions as antagonistic to the principle of that democracy; whether it would attempt to outlaw them is a separate question. Certainly, especially after Professor Kirchheimer's analysis, no friend of democracy can be excused for advocating repression for "light and transient causes"; but he would nevertheless, and despite Professor Kirchheimer, regard it as "a matter [subject to] rational choice."[8] The problem of achieving and maintaining a just regime is more complex than occasionally appears in this book. As Lincoln said at Ottawa: "In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed."[9] A consideration of Lincoln's understanding of the problem posed by the public sentiment that Stephen A. Douglas attempted to mould would, however, lead us beyond a consideration of the analysis contained in this book to a consideration of the larger question mentioned above.

Whether "political justice" will pass into desuetude if national states are replaced by a world government[10] or by a system of "transnational control of the crimes against the human condition,"[11] seems doubtful at best, since there is no reason to believe that a world regime will not, like all its predecessors, have its "foes" too—especially when, as this reviewer has argued,[12] a world government will almost certainly be a world-wide tyranny.

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WALTER BERNS

8. P. 172.
9. Speech at Ottawa, Ill., Aug. 21, 1858, in ANGLE, CREATED EQUAL: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 128 (1958).
10. Pp. viii-ix n.1.
11. P. 341.
12. Berns, *The Case Against World Government*, in READINGS IN WORLD POLITICS (1959).

this is a special issue, touched upon only in a peripheral way in this careful and valuable study.

University of Alberta, Calgary FREDERICK G. HEYMANN

MICHAEL J. RURA, *Reinterpretation of History as a Method of Furthering Communism in Rumania: A Study in Comparative Historiography*. Washington, D.C.: Georgetown University Press, 1961. xi + 123 pp. $2.50.

Mr. Rura's study is a timely presentation of a theme which could more fittingly be entitled: "The falsification of history as a method of Communist indoctrination." The author tackles the subject in an academic way by comparing Rumania's pre-Communist historical tradition with that manufactured by the Communist historians. Implying that the old school laid itself open to attack by underscoring national themes and minimizing revolutionary currents, the author recognizes nevertheless that the basic preoccupation was the search for truth. The description of the methods used by current historians to destroy the traditional interpretation and substitute their own version makes it obvious that the term "reinterpretation" should properly be discarded.

Rejecting virtually all the traditional tenets as unscientific, current historians have changed the periodization to conform to the Marxist pattern, substituted Slavic for Roman origins, evaded religious and national problems by considering only social and economic ones, replaced exploits of princes with themes of social unrest, stressed the liberating role of Russia in contrast to the exploitation of the Western powers, censored all embarrassing problems, particularly in contemporary political history up to 1944, and filled the vacuum with a mythical Russo-Rumanian revolutionary theme. Mr. Rura stresses the methods by which all this was achieved by heading his chapters: Reinterpretation by omission, substitution, emphasis and corruption—a division which entails a certain amount of repetition. The author certainly deserves to be commended for his painstaking examination of Communist documentation—materials which are not always easy to obtain.

The weakest side of Mr. Rura's analysis is that dealing with Rumania's prewar historiography, which, assuming that there is a basis for comparison with that of the postwar period, is presented in an oversimplified way. The choice of authors cited is not sufficiently discriminating, and Mr. Rura too often bases his opinions on foreign writers who cannot be ranked as pre-Communist Rumania's foremost historians. Some of these lacunae stem from the unavailability of many traditional works in the West, which in itself provides eloquent testimony to the effectiveness of Communist suppression.

Oxford University RADU R. FLORESCU

OTTO KIRCHHEIMER, *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton, N.J.: Princeton University Press, 1961. xiv + 452 pp. $8.50.

The Introduction to Professor Otto Kirchheimer's volume seems to commit the author to a comprehensive analysis of a highly significant but extremely elusive phenomenon. But the actual structure of the book follows a considerably more eclectic design. As the table of contents indicates, the emphasis is upon certain selected phases or aspects of political justice, and its contribution lies in an exceedingly informative survey of examples of the thing being defined rather than a systematic exposition or inventory of its essential attributes. Part I is devoted to a review of the cases and methods illustrative of political justice; Part II to the complexion of the components of the trial situation in a political case, that is, the roles of judge and defendant vis-à-vis the state; and Part III to certain means by which political justice is modified, that is, asylum and clemency.

From an institutional point of view the chief merit of the book for Anglo-American readers lies in the author's survey of the work of the continental "constitutional courts" in relation to political controversies. His command of these sources is—at least to the best of this reviewer's knowledge—admirably complete, and it would be highly desirable if students of domestic public law would take more careful note of such comparative data.

From a more topical point of view, the author's principal contribution lies in his treatment of the predicament of democratic constitutional regimes (the so-called open societies) when confronted by claims to the exercise of freedom of speech, press, and assembly by organizations dedicated to the ultimate overthrow of governments which cherish such freedoms. Professor Kirchheimer's recurrent references to this problem—combining, as they do, a familiarity with both Anglo-American and continental precedents—are extremely valuable. This perspective, for example, enables him to discuss the clear and present danger test (which our own publicists have a tendency to praise or damn rather uncritically) with sober appreciation of both its merits and limitations.

The foregoing tributes must be offset by certain reservations. As already suggested, the promise of the book on the theoretical plane is hardly fulfilled. "Political Justice" cannot be adequately defined without putting down a firm jurisprudential foundation, and this Professor Kirchheimer does not do. His view of the relationship between law and the state, for instance, is only tangentially reflected in his discussion of other subjects. Consequently, the reader is deprived of a frame of reference for the concept of "legality" which is constantly and necessarily so employed in contradistinction to "that which is merely ordained by the Powers that Be."

This means that the book presents facets of his professed subject rather than the definitive categories the reader may have been led to expect. It also frequently means that the categories he does use are inadequately explained. In Chapter 4, for example, a minority regime's admittedly constitutional repression of democratic movements is treated as no less exemplary of illegality than a majority regime's unconstitutional repression of minorities. The inference here is either that the preconceptions of political democracy (the universal franchise, etc.) are directly incorporated in the rule of law, or that equality, in the sense required for full political democracy, is part of a natural law order which in turn furnishes the test of legality. Yet the reader cannot be sure that such an inference is intended

because a philosophical position sustaining them is nowhere formulated.

Finally, the author's style is not conducive to easy reading and it is sometimes ponderously verbose without the excuse of profound content. On page 6 of the introduction, for instance, the author demonstrates an uncanny ability to fatigue the reader in the course of a relatively short sentence. I quote: "The more elaborate the paraphernalia of authentication the greater the chance of vicarious popular participation in its conundrums."

It would be unfair to suggest that all his conclusions are similarly encumbered. Some of them are succinctly put and convey useful insights. I shall therefore conclude this brief review with another quotation, from the final paragraph of Chapter 3: "Thus the lasting results of the propaganda trial are likely to be paradoxical. The morality play, after serving the political needs of the day, will survive mainly as a testimony to its initiators' own frame of mind, which may well prove more distorted than that of their victim."

University of Washington KENNETH C. COLE

KLAUS MEHNERT, *Soviet Man and His World.* Translated by Maurice Rosenbaum. New York: Frederick A. Praeger, 1962. 310 pp. $5.95.

Soviet man in Klaus Mehnert's view is significantly different from his Russian grandfather, but not entirely a "new Soviet man." A German by birth, Mr. Mehnert was reared in tsarist Russia, educated in Germany and America, and has subsequently specialized in Soviet affairs. He resided and traveled in Russia on thirteen separate occasions, together totaling six years. Thus, he is uniquely qualified for his task.

In *Soviet Man and His World* Mr. Mehnert has analyzed the impact upon the present-day Russian of three primary influences: his heritage of traditional Russian characteristics, the forces of industrialization, and the pressures of Communist social engineering. His conclusions are perceptive and should be of interest and value to the specialist and layman alike. "The Russian of today," he stresses, "is more moderate, more disciplined, than his forebears; his boundless energy is absorbed by exacting labor and checked by strict laws" (p. 32). On the one hand, Soviet man respects (even though he somewhat resents) the privileged scientist and Communist functionary in much the same manner that his grandfather tended servilely to admire the elite in tsarist Russia. His fear of being spied upon and his distrust of all about him during the worst Stalin years have, significantly, failed to snuff out his inherited human warmth, boisterousness, and overt sympathy for his fellow beings and his gregariousness. Like his predecessor, he is reluctant to accept personal responsibility.

On the other hand, Soviet man's inherited capacity to endure hardship and bow to the inevitable has abetted Communist dictatorial rule. Despite the latter, however, the author believes that Soviet man has become more egotistical and not more collectivist minded. Indeed, after comparing Russians with Americans, the author concludes that Soviet man is more man than he is Soviet: he is, and likely will remain, more concerned with assuring his personal security, maximizing his privacy, and extending intellectual free-

personal or political freedom: not personal, since man has freedom only as a relation to other men; not political, since the political relation is just another social relation. Freedom is not the contrary of unfreedom, as a man is not unfree when he is forced to do something, yet not free in the doing of it, to refrain from doing it. Power and freedom can combine so that a man of inferior power is free on sufferance, though not free of sufferance, whereas his superior is free to dominate him.

Mr. Oppenheim discusses other meanings of freedom, descriptive and valuational; of the former, he repels the opinion that freedom is freedom of choice, because we are always free to do or to try the impossible. Freedom has a character so irremediably specific that we can in general speak only of a single relation of freedom, never of a free society made of such relations; freedom has dimensions but is not a whole. In his last chapter, Mr. Oppenheim explains the value of the scientific conception of freedom for the normative problems of freedom, which is nothing less than to make intelligent discussion of them possible for the first time.

Mr. Oppenheim values fruitful over colorful language; he has produced clear language. His book contains some alphabetical abbreviations, and a few neologisms ("counterintuitive" is a happy conceit), but it is free of jargon, and abounds in examples. In this effect, it is a contribution not only to behaviorism but to the controversy about behaviorism.

HARVEY C. MANSFIELD, JR.
University of California, Berkeley.

Political Justice. By OTTO KIRCHHEIMER. (Princeton, New Jersey: Princeton University Press, 1961. Pp. vii, 452. $8.50)

The use of legal procedure for political ends is most frequently associated with strongly authoritarian or totalitarian systems of government. This book is an important contribution to the study of courts in the political process, because it examines the role of the judiciary to gain certain political ends under constitutional systems. Professor Kirchheimer's systematic analysis of trials for various political purposes under constitutional and totalitarian systems stresses the problems which each system encounters in achieving the aims of the trial, the various forms of trials, the "dramatis

personae" participating in the political play brought into the courtroom, and pursues also the nature of clemency and asylum.

Assuming that "every political regime has its foes or in due time creates them," the author points out that the ensuing power struggles between the regime and its foes and among competitors for political power will take a variety of forms. The courts, which through show trials, legalization of purges and staged public confessions of political opponents of a system, have served as terror and propaganda instruments of totalitarian systems, do have an important, albeit somewhat different, extra-legal function also in constitutional systems.

As constitutional governments in modern times grew in scope and their political power came to rest on the broader bases of unlimited suffrage and extensive public opinion, conflicts arose within democracies which engulfed the judiciary along with the traditionally "political" parts of government. The author summarizes the most urgent occasions for court action in connection with repressive programs in contemporary non-totalitarian society in four categories: (a) formal restriction of freedom which becomes necessary for successful police and security operations; (b) control measures which have passed the dividing line between informal restraints and actual coercion and result in the victim's demand for formal adjudication; (c) the government in question has decided on either total repression of its foes or on wearing them down by continuous judicial proceedings against them which limit their political availability; (d) carefully chosen segments of deviant political activity are submitted to court scrutiny, not so much for repressive effects as for dramatizing the struggle with the enemy and gaining public support.

The problems which beset a constitutional system if it wants to take either one or all of the above steps involving the judiciary are complex, and Professor Kirchheimer points up these complexities by a thorough analysis of the Smith Act trials in the United States and the procedures involved in outlawing the Communist Party in the Federal Republic of Germany. He shows the greater dilemma confronting the United States judiciary, because constitutions of the "older liberal type" make the substantive determination of the sphere of permissible revolutionary action and propaganda quite problematic. Under the American Constitution the Supreme Court was forced to make specific acts on the part of the accused the basis of judgment. According to the rule of law it is not enough

to know that the group in question prepares a state of psychological readiness for future political action, and demand total repression. The position, however, calls for a constant alertness, frequent shifting of positions and relocation of battle lines between the governmental organization (and its instrument—the judiciary) and the hostile group.

The Bonn Basic Law, on the other hand, an example of a more recent constitution, drawn up as reaction against totalitarianism, clearly makes repression of antidemocratic political movements part of the rule of law. This enables the judiciary to consider a suspected group's perennial readiness to take action which will ultimately result in the destruction of the constitutional system as a sound basis for legal and complete repression.

It is this conflict between legal repression of political organization and constitutional systems based upon competing political parties and the writer's penetrating analysis of a troubling subject matter which make the book an important source for any scholar interested in political justice. The section on political trials under totalitarian systems pointing out difficulties even for those regimes to explain judicial involvement in political matters, and the massive documentation with sources usually not gathered within one volume, add to the significance of this book. The only question of "political justice" which to this reviewer could have been pursued in greater detail is that of impeachment. However, the scope of the book is so broad that not all aspects should possibly be treated in equal depth.

ELKE FRANK

Florida State University

The Moulding of Communists (The Training of the Communist Cadre). By FRANK S. MEYER. (New York: Harcourt, Brace and Company, 1961. Pp. 214. incl. index. $5.00.)

This is one of a series of studies of Communist influence in American life, supported by the Fund for the Republic under the general editorship of Clinton Rossiter. It is easily the best of the series, because it is the most authoritative. As a result, the reader is able to grasp the profoundly different character of Communist consciousness. As Meyer puts it: "For the Communist is different

METAPHYSIK. By Emerich Coreth, S.J. Innsbruck: Tyrolia-Verlag, 1961. Pp. 690. Sfr. 33.

This is a brilliant attempt to re-establish metaphysics as the "science of being." Beginning with the scientific evidence already contained in the very capacity to ask what being is, the author handles with assurance the insights into this question contributed by modern philosophers from Kant to Husserl and Heidegger. Thus, though his thinking is basically scholastic in orientation, he seeks to incorporate into it the best efforts of "transcendental" thought. The result: a remarkable methodological rigor in reflecting on the evidence from beginning to end leads once more to the conclusion that metaphysics finds its ultimate foundation in the Being of God.

Fordham University. QUENTIN LAUER, S.J.

POLITICAL JUSTICE. The Use of Legal Procedure for Political Ends. By Otto Kirchheimer. Princeton, N. J.: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

When judicial authority is used to tip the scales in situations of political equilibrium, the concept of justice is found in the most ephemeral of its divisions. Traditional categories of commutative, distributive, social, and legal justice embody strict moral implications in man's societal life, but the purpose of the phenomenon which the author describes as political justice is pragmatic: the widening of the scope of man's political activity by enlisting the services of the courts in behalf of mainly political goals. The controversial Nuremberg trials and Israel's dramatization of a tragic era in Jewish history, uniquely staged by an Eichmann trial, mark the timeliness of this scholarly book.

The first of the book's three parts treats principally of the causes and methods of a state's legal protection against dissenters. The author presents the notorious "L'Affaire Caillaux," the treason charge levied against a French statesman by his political opponents because of his advocacy of a negotiated peace with the enemy in 1917. The trial of Archbishop Stepinac in Yugoslavia and the use of the courts to further the state policy of anti-Semitism in Nazi Germany or race superiority in South Africa are some of the other well-documented examples. We are reminded also of the criminal syndicalism laws of the 1930's in the United States which were used to counter incipient miners' unions. And of course, we have the Alger Hiss trial, wherein certain fragmentary acts of the defendant were brought to light in order to create an unfavorable image based upon his political and ideological beliefs.

In the second part of the book dealing with the *dramatis personae* of the phenomenon of political justice, the author points out the complexity of the judge's task of individualizing the norm in concrete case situations. For norms, we are told, are not meant for eternity, and those with which the judge must work are gauged to long-term community needs, individual circum-

stances, and "specific sociopolitical configurations of the age." One wonders if this is a jurisprudential concept somewhat similar to that of Jhering, based on a morality of interests; perhaps such a concept would be more at home within the corpus of doctrine attaching to the sociological school of jurisprudence identified in this country with Roscoe Pound.

The defendant in the political trial usually has considerations at stake far beyond that of a favorable court decision. Such considerations successfully promulgated are exemplified in the trial of Jesus before the Sanhedrin and in the classical trial of Socrates, while unsuccessful promulgation is evidenced in the recent failure of American Communists to win popular appeal through the Smith Act trials. We should not forget, however, that the bumpy road from the courtroom dock to national leadership is a well-traveled one: De Valera, Gandhi, Nehru, and countless Soviet revolutionaries are but a few who bear witness to this fact.

The difference between the responsibility involved for political-military failure and for inhuman conduct must be recognized in what the author terms the "trial by fiat of the successor regime." Such was the Nuremberg experience, and more. With all of its insufficiencies it was "the feeble beginning of trans-national control of the crime against the human condition." We note with the author that the charges preferred at Nuremberg for the most part were not charges of crimes against humanity, but were charges of war crimes, similar in many respects to other common crimes.

The final part of the book has to do with the legal devices of asylum and clemency by which the impact of political justice can be modified or even frustrated. Their names may differ over the years, but we have always with us the expatriate, the émigré, or the refugee.

In describing some of his specifications of justice it would seem that the author has assigned an enlarged meaning to the adjective "political." Nevertheless, these specifications provide valuable insights into the nebulous and neglected political aspect of jurisprudential study.

Weston College. FRANK B. HIGGINS, S.J.

ant is charged with an offense drawn from the ordinary criminal law. Civil actions, such as libel suits, may also serve political ends. A special class of actions is the trial of a predecessor by a successor regime, as in the Nuremberg trials, which are considered at length. In most cases political justice aims at public opinion rather than at the ostensible victim: the purpose is to vindicate a regime or a candidate or a policy by establishing an image of the opponent as an enemy of the common good.

Thus the political trial undertakes to recast history into a desired pattern. By focusing on a single event, to which are attached both decisiveness and culpability, it radically distorts the subject; but of course distortion is the purpose. The political trial is a morality play. The characters are the judge, the jury, the lawyers, informers, and the parties. Usually the state is one of the parties; and it also supplies the stage directions. In interpreting their roles the actors enjoy a certain latitude. How great this is, and how it is used, depend on many circumstances; these the author explores and illustrates.

A chapter is devoted to asylum, and another to clemency. These arise in such widely varying situations, and discretion plays so large a part, that systematization cannot proceed very far.

It is clear that Dr. Kirchheimer does not attribute entire objectivity and certitude to the judicial process at its best. His approach is a blood-chilling legal realism. Consequently he takes for granted both the inevitability and the injustice of political trials. They have, however, this merit: they are a part of the struggle for political power, and without them the struggle would continue in a less orderly way.

Judicial process has as its objective the solution of problems in terms of truth and reason. When the magnet of power enters the field, must the needle invariably swing to the new pole? *Political Justice* recounts a few cases in which this did not occur, but these must be regarded as exceptions to the rule. The dispassionate accuracy and the profundity of the book make the conclusion the more depressing.

FRANCIS D. WORMUTH

University of Utah

LONGAKER, RICHARD P. *The Presidency and Individual Liberties.* Ithaca: Cornell University Press. 1961. xii & 239 pp. $4.50.

Apprehensive of unrestrained and concentrated power, the men at Philadelphia drew the lines of the executive office in the United States as part of the framework of the separation-of-powers principle. Ham-

Michigan Law Review

BOOKS RECEIVED

BAR ASSOCIATIONS

CITATIONS AND BIBLIOGRAPHY ON THE INTEGRATED BAR IN THE UNITED STATES. *American Judicature Society.* Chicago: American Judicature Society. 1961. Pp. 66. $1. (Special law school rate of 50¢ per single copy; 25¢ for five or more.)

BIBLIOGRAPHY

See also *Bar Associations.*

ANNUAL LEGAL BIBLIOGRAPHY. A selected list of books and articles received by the Harvard Law School Library from July 1, 1960 through June 30, 1961 including all items which have appeared in Volume One of *Current Legal Bibliography.* Edited by *Vaclav Mostecky.* Cambridge, Mass.: Harvard Law School Library. 1961. Pp. xi, 215.

BIOGRAPHY

LINCOLN AS A LAWYER. By *John P. Frank.* Urbana: University of Illinois Press. 1961. Pp. x, 190. $4.75.

CIVIL RIGHTS

FREEDOM AND PROTECTION: THE BILL OF RIGHTS. By *Andrew D. Weinberger.* San Francisco, Calif.: Chandler Publishing Co. 1962. Pp. xii, 180. $3.

CONSTITUTIONAL LAW

THE SUPREME COURT REVIEW, 1961. Edited by *Philip B. Kurland.* Chicago: University of Chicago Press. 1961. Pp vii, 332. $6.50.

CONVEYANCING

A HANDBOOK FOR MORE EFFICIENT CONVEYANCING. By *Lewis M. Simes,* Professor of Law, Hastings College of Law, University of California; Professor Emeritus of Law, University of Michigan. Ann Arbor: University of Michigan Law School. 1961. Pp. xii, 98. $2.

CRIMINAL LAW AND PROCEDURE

See also *Criminology.*

COMMON SENSE ABOUT CRIME AND PUNISHMENT. By *C. H. Rolph.* New York: Macmillan. 1961. Pp. 175. $2.95.

CRIMINOLOGY

PRACTICAL HOMICIDE INVESTIGATION. By *Edward A. Dieckmann, Sr.,* Detective Lt., Commanding Homicide Squad, San Diego Police Dept. (Retired). Springfield, Ill.: Charles C Thomas. 1961. Pp. xiii, 85. $4.

ELECTIONS

MICHIGAN VOTES: ELECTION STATISTICS, 1928-1956. 1960 Supplement. Papers in Public Administration No. 24. By *John P. White,* Assistant Professor of Political Science, University of Michigan. Ann Arbor: Institute of Public Administration, University of Michigan. 1961. Pp. vii, 10. Paper, $1.

FOREIGN GOVERNMENT

CHIEFS OF STATE AND CABINET MINISTERS OF THE AMERICAN REPUBLICS. *Pan American Union.* Washington, D.C.: Pan American Union. 1961. Pp. 25. Ten cents.

FOREIGN LAW

A STATEMENT OF THE LAWS OF COLOMBIA IN MATTERS AFFECTING BUSINESS. 3d ed. By *Bernardo Rueda.* Washington, D.C.: Pan American Union. 1961. Pp. xii, 303. Paper, $5.

A STATEMENT OF THE LAWS OF ECUADOR IN MATTERS AFFECTING BUSINESS. 2d ed. Supplement No. 2. By *Eduardo Serrano Moscoso.* Washington, D.C.: Pan American Union. 1961. Pp. 59. $1.

THE FACES OF JUSTICE. A Traveller's Report. By *Sybille Bedford.* New York: Simon & Schuster. 1961. Pp. 316. $4.50.

GOVERNMENT AND POLITICS

POLITICAL JUSTICE. The Use of Legal Procedure for Political Ends. By *Otto Kirchheimer,* Professor of Political Science, Columbia University; Member of Graduate Faculty, New School for Social Research. Princeton, N.J.: Princeton University Press. 1961. Pp. xiv, 452. $8.50.

JURISPRUDENCE

AFRICAN CONFERENCE ON THE RULE OF LAW. Lagos, Nigeria, January 3-7, 1961. *International Commission of Jurists.* Geneva, Switzerland: International Commission of Jurists, 6 Rue du Mont-de-Sion. 1961. Pp. 181.

LAW IN THE MAKING. 6th ed. By *Sir Carleton Kemp Allen,* of Lincoln's Inn, Barrister-at-Law, Emeritus Fellow of University College, Oxford, Sometime Professor of Jurisprudence in the University of

Social Research

AN INTERNATIONAL QUARTERLY OF POLITICAL AND SOCIAL SCIENCE

66 WEST 12 STREET · NEW YORK 11, N. Y.

Edited by THE GRADUATE FACULTY OF POLITICAL AND SOCIAL SCIENCE OF THE NEW SCHOOL FOR SOCIAL RESEARCH

May 23, 1962

Princeton University Press
Princeton
New Jersey

Dear Sirs:

Enclosed are clippings from the Spring issue of Social Research in which a review of your publication appeared.

We are sending tear sheets also to the author directly. As I think you know, we were all very pleased with Kirchheimer's work.

Sincerely,

Jean Van Hyning

Jean Van Hyning
Editorial Secretary

Princeton

With the compliments of the

OXFORD UNIVERSITY PRESS

Oxford House, Apollo Bunder, Bombay 1

Quest (Bombay)
Jan/March 1970

A. G. Noorani

LAW AND POLITICS

THE conflict between arbitrary power and individual freedom is rooted in the very nature of human society. In varying degrees societies have sought to fetter the power of authority, to regulate and restrain its exercise by law. Even Communist States speak of 'socialist legality'. In the traditional democracies the effort seems to have succeeded. Yet, in times of crises, even these have behaved in a manner which makes one sceptical about success. Is the State's willingness to be bound by the law dependent on the absence of any major incentive to flout it in the name of its own survival?

Since the Courts are the prime custodians of the enforcement of the law, it is but natural that the conflict is reflected in their structure and functions, in the independence they enjoy and the uses to which they are put. It is legitimate, for instance, that the verdict of the Court be sought to eliminate treason. But what if the Courts be used also to stifle dissent? Likewise, the individual would be justified in invoking judicial assistance for the protection of his rights. It is wholly a different situation when a person pledged to the subversion of the order uses the judicial machinery to secure his freedom to subvert. Clearly, the quality of the State will be measured by the fairness with which it holds the balance.

Political Justice: By Otto Kirchheimer (Princeton University Press; Agents: Oxford University Press $ 3.95) is a pioneering work on the subject. Sub-titled 'The Use of Legal Procedure for Political Ends', the book is a veritable encyclopaedia, so large is the variety of regimes it considers. Some of his conclusions seem cynical and extreme. But his scholarship compels admiration.

'The term Political Justice is usually taken to reflect the search for an ideal order in which all members will communicate and interact with the body politic to assure its highest perfection. Is it, then, gross linguistic abuse and utter cynicism to apply this term, as European writers have traditionally done, to the most dubious segment of the administration of justice, that segment which uses the devices of justice to bolster or create new power positions? The opposite is nearer the truth. The Greek ideal grows sharper in profile precisely because justice in political matters is more tenuous than in any other field of jurisprudence, because it can so easily become a mere farce. By utilizing the devices of justice, politic contracts some ill-defined and spurious obligations. Circumstantial and contradictory, the linkage of politics and justice is characterized by both promise and blasphemy.'

The legitimacy of dissent and, therefore, of its legal protection, is a modern phenomenon. In olden times affairs of the State enjoyed a certain exemption from judicial scrutiny. Richelieu said, 'In normal affairs the administration of Justice requires authentic proof; but it is not the same in affairs of State.'

The author gives three categories of political trials: 'The trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution;

'The classic political trial—a regime's attempt to incriminate its foe's public be-

haviour with a view to evicting him from the political scene; and

'The derivative political trial, where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe.'

But the classic political trial, really, is the one used to uphold or to shift the balance of political power. 'With or without disguise, political issues are brought before the courts; they must be faced and weighed on the scales of law, much though the judges may be inclined to evade them. Political trials are inescapable.'

This is particularly so when the very existence of a political movement is in issue. The author poses the problem thus: 'In a democratic system the activity of a revolutionary party has its paradoxical aspect. While expressing the very essence of an open society, it is directed at uprooting this society. And yet an open society, even if it is not torn apart by crucial social or racial problems, must give rise to such hostile activity so long as there is no universal agreement on the desirability of structural changes; political myths retain their attractiveness, and the distribution of social and political power remains unequal—something which neither free elections nor added pressure groups can make disappear. But then how can democracy, bent like any other political system on self-preservation, permit the unimpeded operation of groups hostile not only to the present government but to the very essence of a system in which change is predicated on majority agreement?'

The Basic Law of the Federal Republic of Germany expressly empowers the Constitutional Court at Karlsruhe to ban a political party after a proper trial. So far it has found only two parties to be illegal —the Socialist Reich Party and the Communist Party.

It is a very delicate question, involving as it does in Justice Jackson's phrase 'a prophecy in the form of a legal decision.' The Court's verdict is not only based on the known facts about a party's past but also on an estimate of its future potentialities for subversion.

The Karlsruhe Court solved the problem neatly. 'In persistently regarding Communist Party doctrine as an indivisible whole, binding upon the conduct of the party organization and every individual party member, the German Constitutional Court did exactly what Leninism demands of his followers, thus putting the Communist Party on the spot. Being evasive and tortuous in their refutation of the unconstitutionality charge, the party's lawyers went to all lengths to obviate discussion of what party doctrine ineluctably implies for party activity. As the Court did not oblige, a more complex course was taken. The party's spokesmen insisted that only the immediate objectives pursued in the obtaining historical situation were within the purview of the Court and that these must be viewed as independent from and unrelated to revolutionary implications of the party's social theory; these implications, they said, referred solely to an expected future situation.'

Undoubtedly, the plea would be made by Communists everywhere and deserves the answer the Court gave.

In the famous Dennis trial, in the U.S., the problem was differently put but received the same answer. 'Attention was focused on two points: the definition of 'teaching'; and the elusive difference between permissible exposition of doctrine and illicit advocacy of action that effects specific parts of the doctrine. The defendants were free to admit that it was within the realm of their doctrine to discuss historial situations in which the violent overthrow of the capitalist system was inevitable; but they had to deny having advocated a doctrine requiring the violent overthrow of the government of the United States. It was up to the prosecution to show that, beyond the realm of abstract exposition, advocating overthrow had been not virtually implied but actually committed.'

Dr. Kirchheimer's answer to the sophistry of Communist lawyers is devastating. 'The role of violence in this history-ordained

revolutionary process appears in two ways. For one, it is inescapable destiny; the dominant class of capitalist society, whose position in the process of production has been slowly undermined over a long period of time, must be dispossessed and suppressed; and as no class in history has ever given up its role without a struggle; the violent class is inevitable. Secondly, violence is a job necessary for the sake of progress, a duty devolving on the prime movers of the historical process in the present era, that is, the working class, guided by the revolutionary, Marxist-Leninist Communist Party. What is doomed to fall must be given a shove and a thrust to make it fall. Swift, well-planned, violent action will speed up mankind's advance towards harmonious existence.

'Obviously, this historical mission of the Communist Party is not easily reconcilable with the observance of the constitutional order in a democratic state. Here Communist interpreters introduce another distinction, equally serviceable in United States courts and at the trial in Kalsruhe. Marxist-Leninist theory commands a thorough, penetrating, examination of the 'objective' situation prevailing at any given moment in history. At the present juncture, the interpreters contend, the 'objective' situation bars a revolutionary course of action; consequently, only ignorance and malice could impute to the Communists the intention to interfere with the democratic process in Germany, or to advocate violent overthrow of the government in the United States. Does 'knowledge of the laws of history' give Communist doctrine a special status in Court? Are Communist lawyers the only expert witnesses whose interpretation of Communist teaching must be accepted on faith? Even conceding that under the principle of freedom of scientific inquiry, Communist doctrine is no more subject than any other political philosophy to verification or invalidation by court decision, why should a court renounce the right to do its own study of the doctrine's implications?

'The Karlsruhe court definitely refused to yield to the interpretation monopoly claimed by the Communist Party and its doctrine and law experts; Communist doctrine—to the extent that it had become a determinant of action patterns—was held essential for the court's interpretation and understanding of the party's conduct, and it did a comprehensive analytical job. The procedure seems sensible and legitimate in the light of Article 21 of the Basic Law. If it is the right and duty of a party member to check the correctness of this or that move against the tenets of party doctrine, why indeed should an outside observer refrain from learning the meaning of Communist action from the logic by which each point in doctrine and action must fit into the sum total of official teaching?'

The legal problem of banning Communist Parties is not an insuperable one, given the vast literature on Communist doctrine and practice. But what of other organisations? What other criteria besides allegiance to a foreign power or advocacy of the use of violence, may a State properly set for the banning of a political party or the restriction of individual freedom?

Here one moves into that twilight zone between treason and heresy and the outcome of the debate is determined by the outlook of the judiciary itself and, indeed, by that of society as a whole. 'The judge, or for that matter the jury, officiates within a given social and political structure. Like the prosecutor or policeman, he is an instrument of a concrete political system established at a particular time and place. If community-wide agreement on methods and objectives exist, if the public order has been so long established that it is taken for granted by all strata, the judge may be listened to as the spokesman of a God-given and just order. But the degree of group satisfaction may vary considerably, and systems and power holders may change in rapid succession. Under such circumstances, the judge's ability to officiate as the incarnation of the authority of the group, dispensing justice to the individual even while adjudicating attacks on the

regime, will suffer correspondingly. It will become more difficult for him to perform the feat for which the community selected him: to give a just decision to the individual case thrust upon him. 'Just' in this case would mean a decision not merely serving the needs and pressures of the moment, but capable of finding a wider and less transient adherence; a skilfully rationalized decision able to withstand a dispassionate scrutiny of its motivations.'

* * *

There must be few cases, indeed, in which the motivations of a judiciary were as plainly and pathetically exposed as in the cases of the evacuation and internment of Americans of Japanese origin in the Second World War. *Prejudice, War and the Constitution*: By Jacobs ten Broek, Edward N. Barnhart, and Floyd W. Matson (University of California Press, Berkeley $ 2.25) is a thoroughly documented account of the causes and consequences of that shameful episode in American history.

'One hundred and twelve thousand persons, two-thirds of whom were American citizens, were uprooted from their business, their farms, their homes; they were banished and interned for two and one-half years under guard and behind barbed wire, 'under conditions' in Judge Denman's words, 'in major respects as degrading as those of a penitentiary and in important respects worse than in any federal penitentiary'. Justice Murphy, in a dissenting opinion in the *Korematsu base*, characterized the action as 'one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law. The truth of this judgment depends, of course, upon whether the wartime power of the military over civilians within the country is a constitutional power and whether the military in this instance acted within that power; in short, it turns upon the constitutional correctness of the opinion of the United States Supreme Court to which Justice Murphy was dissenting. But certainly, on the face of it, the American citizens of Japanese ancestry—and in many respects Japanese aliens as well—were sweepingly deprived of their constitutional rights of personal security: the rights to move about freely, to live and work where one chooses, to establish and maintain a home; and the right not to be deprived of these rights except upon an individual basis and after charges, notice, hearing, fair trial, and all the procedural requirements of due process of law. More serious still was the apparently flagrant denial—flagrant because the classification was based solely on race—of the guarantee of equal and non-discriminatory treatment implicit in the Fifth Amendment. Not that racism in other contexts has been unknown in America—far from it. But Americans have always been profoundly concerned by this disparity between creed and practice. The courts have condoned it only with the greatest reluctance. Moreover, this latest departure from the democratic ethic was more blatant than any before it. For the first time in the nation's history, race alone became a criterion for protracted mass incarceration of American citizens."

The book's analysis of the U.S. Supreme Court's judgments in the two major cases that went before it is as thorough as its indictment is damaging. "In this way did the U.S. Supreme Court strike a blow at the liberties of us all.'

But it fails to ask why the Judges behaved the way they did. Mr. Walter F. Murphy[1] gives a good example of judges being swayed by considerations of patriotism in cases involving issues of national security. "In Ex parte Quirin, the Justices were unanimous in their conclusion that the government could try captured Nazi saboteurs in military tribunals rather than in regularly constituted civil courts, but they could not agree on an opinion explaining why such trials were constitutional. After the Chief Justice had

[1] *Elements of Judicial Strategy*, The University of Chicago Press, 1964, p. 48.

circulated three different drafts of an opinion without securing full assent, one of the other members of the Court sent a long memorandum to all of his colleagues."

At the end of this epistle came this priceless gem. 'Some of the very best lawyers I know are now in the Solomon Island battle, some are seeing service in Australia, some are sub-chasers in the Atlantic and some are on the various air fronts. It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out agreement in result and reveal internecine conflict about the manner of stating that result. I know some of these men very, very intimately. I think I know what they would deem to be the governing canons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: 'What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and Nazis without having you fellows on the Court dissipate thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power . . . ? Haven't you got any more sense than to get people by the ear on one of their favourite American pastimes—abstract constitutional discussions? . . . Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produces is a pastime we had better postpone until peacetime."

Mr. M. C. Setalvad refers[2] to the Privy Council's reversal of the Federal Court's famous judgment in Benoari Lal Sharma's Case in which the latter struck down an Ordinance providing for trial of offences under the emergency law by Special Courts. "Colonial writers on Constitutional Law have on occasions characterized judgments of the Privy Council as having been influenced by considerations of policy. It is not surprising therefore that similar comments should have been made in regard to the view taken by the Privy Council in Benoari Lal Sharma's case."

One wonders how far a critic of the judgments of our Courts can go in attributing policy considerations in sensitive cases.

Political justice has reared its head in India. The Unlawful Activities (Prevention) Act, 1967, goes a long way towards outlawing dissent on some vital aspects of India's foreign policy.[3] This law was enacted in the teeth of the late Prime Minister, Mr. Lal Bahadur Shastri's advice (October 31, 1964) that in a democratic country like India, problems such as those in Kashmir, Nagaland and Madras should generally be tackled on the political level rather than by utilizing the power of the State. He said some people in Kashmir and other parts of the country were advocating that the Government should take action against those who talked of independence for Kashmir. But in a democracy the Government did not rule merely by force. The real sanction behind it was the support it got from the public, he said:

A blatantly political trial was launched and continued for years. "Sheikh Abdullah on trial on charges which everyone recognised were bogus had become the totem figure of the long, dark night of Bakshi rule," Mr. S. Mulgaokar remarked (*The Hindustan Times*, April 8, 1964).

Undoubtedly, the trial did not represent the norm; it was a sorry exception.

As for the courts themselves, on the whole they have acquitted themselves extremely well and contributed immensely to the strengthening of the rule of law in a democratic State. Is it surprising that the

[2] *War and Civil Liberties*, Oxford U. Press; 1946, p. 67.

[3] *Vide* the author's articles in *Weekend Review*, August 5, 1967 and March 23, 1968.

Communists have mounted a concerted attack on the judiciary?

In the long run, both, authority's as well as the individual's effort to use Courts for political ends are futile.

International organisations of high repute and acknowledged impartiality like the International Commission of Jurists and Amnesty International have rendered great service to the Rule of Law by exposing some outstanding abuses of the judicial process committed by States in order to suppress dissent.

Dr. Kirchheimer's conclusion defies improvement: "Political claims eventually stand or fall on their own strength. A political trial might bring out and focus attention on areas of weakness or strength of a political organization or a cause. Yet the authority of the trial neither adds nor detracts from the fundamental justification of such political claims, namely, the justness of the cause.

"To that extent political justice is bound to remain an eternal detour, necessary and grotesque, beneficial and monstrous, but a detour all the same. It is necessary and beneficial because without the intercession of the judicial apparatus the fight for political power would continue as relentlessly, but it would be less orderly. Thus what Pascal calls the 'grimaces', all the external marks of distinction by which the judges establish their title and dignity, are beneficial."

On Political Trials

POLITICAL JUSTICE: The Use of Legal Procedure for Political Ends. By Otto Kirchheimer. 452 pages. Princeton University Press. $8.50.

A PROFESSOR of political science at Columbia University and member of the graduate faculty of the New School for Social Research has here made a wide-ranging (though hardly inclusive) survey in some depth of political justice in many countries from antiquity to modern times.

Political justice, as his subtitle suggests, is the effort, sincere or cynical, to make offenses against the state or the national security look like ordinary crime and to apply to them the process of criminal law.

The author starts off with a vivid narration of the Goebel murder case in late Nineteenth Century Kentucky, when a Governor-elect was assassinated and the resultant trial was almost as much political as juridical. He surveys the trial of the French politician Caillaux after World War I for mere political opposition to war policies, which was construed as treason. The trial of Friedrich Ebert, president of the Weimar Republic, grew out of his postwar strike activities, manipulated into the appearance of libel.

On Repression

There is a spirited chapter on the repression of political organizations held to be subversive, including the anti-Communist legislation in the United States. On the whole, Professor Kirchheimer appears to disapprove of this legislation, preferring the milder British practice, while saying little about the extent to which that practice has served British and Western security.

Perhaps persuaded by the Whig interpretation of history, our author passes over the savage security legislation by which from 1559 to 1829 the English repressed a domestic minority leagued, in English eyes, with foreign and unfriendly powers. He does not comment on the suggestive fact that English liberty flourished coincidentally with this repression and, some historians would say, because of it.

Professor Kirchheimer has a detailed section on the Marxist jurisprudence of East Germany, where the courts are by premise subordinated to political policy. The institution of asylum for political fugitives is surveyed as is the grant of clemency. Professor Kirchheimer has studied trials of the defeated leaders of one regime by those who succeed them, including the special case of the post-World War II trials of war criminals in Germany and Japan.

Doubtless it is these latter studies which help him to the conclusion which he sets forth in an over-brief final chapter—that even political justice is better than no justice at all, that due process is preferable to summary punishment. If the choice in the Goebel case mentioned above had been between trying the accused and lynching them forthwith, all of us would be for trial, however mechanical its procedure and predetermined its result.

The book is massively supported by the scholarly apparatus, each page knee-deep in footnotes. The prose is accurate but accented, sounding more than once as though composed out of Roget's Thesaurus or some other manual remote from common usage. There is at least one curious slip—a confusion of the Subversive Activities Control Act of 1950 with the Communist Control Act of 1954. On the whole, however, this is a solid performance on a vital topic, with the additional virtue of an inclusive index.

C. P. IVES,
Associate Editor of The Sun.

Baltimore Sun

Politische Justiz in amerikanischer Sicht

Camillo Rota: "Ein Todesurteil
wäre zu unterschreiben."
Der Prinz: "Recht gern —
Nur her! geschwind."
Rota: "Ein Todesurteil —
sagt' ich."
Der Prinz: „Ich höre ja wohl.—
Es könnte schon geschehen
sein. Ich bin eilig."

Lessing: Emilia Galotti, I. Akt, 8. Szene.

Seit dem 19. Jahrhundert hat die politische Justiz ihre Opfer unter Juden gesucht und gefunden. Der jüdische Intellekt (und Intellektuelle) stand überall in einer Konfliktsituation in Staaten, die die Justiz mit der Politik "integrierten". "Die politische Justiz" — in den Worten des Staatsrechtslehrers der Columbia-Universität **Otto Kirchheimer** "bringt keine eigene Lösung; sie will lediglich den Zusammenstoss zwischen Herrscher und Gegner, in einer dem Herrscher genehmen Weise, lösen. Wenn ein Staat den Streit mit entschlossenen Gegnern nicht einer wirklich unabhängigen Instanz zur Entscheidung überlassen kann, ist der Prozess dann nichts als die öffentliche Wiederholung einer Entscheidung, die schon anderswo gefällt wurde." (Otto Kirchheimer: Political Justice — The use of legal procedure for political ends", Princeton University Press, 1961). Wir denken an die nationalsozialistischen "Gerichte" und verstehen die Sorge, aus der heraus der amerikanische Jurist resigniert. Aber dann muss es uns stutzig machen, dass er ein Beispiel aus der Praxis Israels heranzieht: "Immer wieder versucht man, die politische Entscheidung durch die gerichtliche zu stärken. Das begann mit dem Ende des ersten Weltkrieges; ...es führte zu dem Wunsche Ben Gurions, die Massenausrottung von Juden in der einmaligen Gelegenheit des Eichmann-Prozesses, als den entscheidenden Punkt für Israels Existenzanspruch in einer ständig drohenden Welt zu benützen."

Kirchheimer denkt als Historiker, als Theoretiker des Rechts; er nimmt nicht Partei. Seine allgemeinen (nicht im besonderen an Israel gerichteten) Schlussfolgerungen stimmen nachdenklich: "Wenn die Beteiligten wünschen, kann der Prozess vor der Weltöffentlichkeit stattfinden. Der Dynamismus eines solchen Unterfangens schafft eine neue politische Waffe. Die Mobilisierung der öffentlichen Meinung ist dann wichtiger als das eigentliche Ziel des Rechtsstreits." Die Frage liegt nahe: Müssen auch Staaten ausserhalb des Ost-Blocks — etwa bei einer Verschärfung der politischen Lage — die von Kirchheimer angedeutete Möglichkeit einer "politischen" Justiz in Betracht ziehen? Man erinnert sich: in der Türkei, der Hauptstütze der westlichen Allianz im Nahen Osten, war es im Jahre 1962 möglich, die bei den Wahlen unterlegenen Führer der grössten Partei vor Gericht zu stellen und hinrichten zu lassen.

Junge Staaten sind traditionslos, selbst wenn die Geschichte die Rechtfertigung ihrer Existenz ist. "Wir lernen aus der Geschichte nur Eines: dass wir aus der Geschichte nichts lernen." Kirchheimers Namensregister liest sich manchmal wie eine Geschichte jüdischen Leidens: Lassalle, Dreyfus, die Opfer der Moskauer Prozesse, Slansky und Reik — es sind immer wieder **Juden**, die für den Unterschied in der politischen Auffassung mit dem Leben oder mit dem Verlust der Freiheit gezahlt haben. Nicht umsonst hat der Juristenberuf den Juden angezogen; das Recht **ist** Rüstzeug in der Abwehr des Unmenschlichen, dem der Mensch nur ein — stets ersetzbarer oder auswechselbarer — Bestandteil der Staatsmaschine ist; der Verlust der Individualität ist, dem Juden, wie jedem religiösen Menschen, ein unerträglicher Gedanke.

Hat die Praxis Israels in den vierzehn Jahren seiner Existenz an die Traditon der Gola in dieser Hinsicht angeknüpft?

Hier hat die Vollstreckung des Todesurteils im Fall Eichmann Zweifel erweckt: Der Staatsmann muss oft rasch handeln; der Richter darf nicht eilen. Die Bestätigung eines Todesurteils ist ein richterlicher Akt; sie verlangt ruhige Erwägung, ebenso wie das Urteil. Lessings Camillo Rota hätte den Prinzen das Urteil "in diesem Augenblicke nicht mögen unterschreiben lassen, und wenn es den Mörder seines einzigen Sohnes betroffen hätte". Aber Lessing passt nicht in den „modernen" Staat; so wenig wie die Weisheit Julius Caesars, der selbst an Catilinariern ein Todesurteil nicht vollstrecken lassen will, bis Pro und Contra in Ruhe erwogen werden können.

Kirchheimers Buch rührt also ein kompliziertes und heikles Thema auf. Die verantwortlichen Minister Israels haben (soweit sie mit der Frage befasst waren) die Vollstreckung des Eichmann-Urteils gebilligt. Wie hätten — in Israel und anderswo — diejenigen reagiert, die die Gefängnisse und Konzentrationslager der Gestapo erlebt und überlebt haben? Wie hätten sie reagiert, wenn ihnen eine nüchterne Darstellung der mit der Vollstreckung verknüpften komplizierten Probleme — etwa im Sinne Kirchheimers — vorgelegen hätte?

Wir wisen es nicht; niemand hat versucht, die Ueberlebenden zu befragen. Und es gab einen Zweifel, der nichts mit dem Urteil, aber viel mit der Stellung des Staates Israel in der Welt zu tun hatte. Dieser Zweifel ist durch die Vollstreckung des Urteils nicht beseitigt worden. Er hat auch mit dem Prozess und dem Urteil nichts zu tun — und nichts mit der Person des Angeklagten.

Die Juden Europas kennen die Bedeutung des Asylrechts — und seiner Missachtung. Sie wussten, dass eine schwache Minderheit (die Juden der Welt sind es überall, auch nach der Gründung des Staates Israel) stets das Recht stützen muss. Sie erinnern sich noch, wie hunderte deutsche Juden von der Schweiz — dem Zentrum demokratischer Kultur — unter Missachtung des Asylrechts an die Nationalsozialisten zurückgestellt" wurden. Prof. Kirchheimer erinnert daran, dass zur selben Zeit die gleiche Schweizer Regierung deutsche "arische" Touristen begrüsste, und die Kennzeichnung der Pässe deutscher Juden durch den Stempel "J" als erwünschte Lösung betrachtete. Der offene Bruch des Asylrechts (die Rückstellung der "illegalen" Flüchtlinge aus der Schweiz) war das Todesurteil für deutsche Juden; unmittelbar für die Ausgelieferten, mittelbar für Unzählige.

Formell ist im Fall Eichmann das Völkerrecht beachtet worden. Im Völkerrecht hat das Individuum keinen Schutzanspruch; da sich Argentinien mit der israelischen Erklärung zufrieden gegeben hatte, brauchte die völkerrechtliche Frage vielleicht nicht einmal erörtert zu werden. Auch die jüdischen Flüchtlinge in der Schweiz hatten keinen völkerrechtlichen Schutzanspruch. Will ein totalitärer Staat in Zukunft einmal einen jüdischen Gegner treffen, so kann er mit einem gewissen Schein von Recht versuchen, sich auf den Fall Eichmann zu berufen — nicht auf das Urteil, das rechtmässig war, aber auf die **Vollstreckung**.

Der Vergleich mit Lessings Prinzen trifft auf die israelischen Minister gewiss nicht zu; sie haben das Pro und Contra erwogen. Aber der blosse **Schein** einer Integration der Rechtsfrage in die Politik (und wie Kirchheimers im Jahre 1961 erschienenes Buch zeigt, bestand ein solcher Schein) ist bedenklich; die Tatsache, dass ein so tief schürfendes Buch den Eichmann-Prozess als Beispiel heranzieht, muss jedenfalls zu denken geben, wie immer man letzten Endes zu Kirchheimers Ansichten steht.

A. BERGMANN

Mitteilungsblatt / Tel Aviv
Nr. 47 - 23 Nov 1962

Books

Politics and Ethics

THE CALCULUS OF CONSENT. By James M. Buchanan and Gordon Tullock. University of Michigan Press, $6.95.

POWER AND CIVILIZATION. By David Cooperman and E. V. Walter. Crowell, $8.75.

THE ETHIC OF POWER. Edited by Harold D. Lasswell and Harlan Cleveland. Harper, $7.50.

DEMOCRACY'S MANIFESTO. By William O. Douglas. Doubleday, $2.00.

POLITICAL JUSTICE. By Otto Kirchheimer. Princeton University Press, $8.50.

✦ THESE FIVE volumes have one thing in common: each is concerned with politics and in each ethical considerations play a role—if not downstage, at least in the wings.

Of the five it is *The Calculus of Consent* which most directly engages the Christian reader in debate. The authors start with an assumption concerning politics similar to that which reigns in economics: rational individuals operate in a situation of competing and sometimes coinciding interests, out of which arise structures and forces which bring about change. Politics, they maintain, is the study of trade in political influence and power whereby the individuals of a given society through give and take learn what basic structures are to their advantage (and which are then adopted as constitutional provisions) and what actions may be taken by a majority within what limits and under what circumstances. The bulk of the book is a highly technical study of this process.

Buchanan and Tullock clearly distinguish between method and ethical judgment. They do not assume that individuals are motivated only by narrow definitions of "interest" or that individualism is an ethical creed for society; they deny only that there is any "public interest" apart from the sum of individual desires, convictions and ideals. Nor do they assume that all men are rational, but only that the state is an artifact which men are able to make and remake in interaction with others—a process which forces a certain rationality upon them. The authors, while not denying that there is an ethical standard for human behavior which stands over against all men, conceive the task of politics to be the "maximizing" of those areas in which individuals' interests coincide with each other and with the ethical standard—in order that ethics not be burdened with an intolerable task of social restraint. Politics, in short, must be methodologically optimistic about man, about progress and about social harmony, but modest in its philosophical pretensions.

Such a science of politics, restricted as it is by assumptions which every reader of Reinhold Niebuhr can easily expose, Buchanan and Tullock themselves recognize its limits: it is inapplicable in situations in which social groups are too large or heterogeneous to establish the basis of common interest in which one member or group refuses to play the game of give and take and has the power to enforce his will; in which for any reason individuals are ill informed or irrational. Indeed, it would seem to be inapplicable in all those conditions wherein because of our sinfulness we find ourselves. The fact remains, however, that the method which the authors expound is essentially that which is employed wherever political construction is being attempted in today's world. It is, for example, the method by which the European Economic Community is being built, with its careful exclusion of appeals to principles and loyalties which might disrupt. It is also the method by which this Community is developing its relation to Africa. And a state department spokesman speaks of discovering "areas of overlapping interest" with the Soviet Union as the methodological hope for the years ahead. Is it possible that some grace broods over this empiricism—a grace which theologians have yet to discover?

The Ethic of Power consists of some 24 papers read to the Conference on Science, Philosophy and Religion at the Jewish Theological Seminary in New York on the subject of the interaction of religion, ethics and politics. The major religions and a variety of ethical and political points of view are represented. Most interesting to this reviewer was the dialogue between the realists and the ethical-system builders on such problems as the ethics of resistance to tyranny and of attempts to influence foreign governments and peoples.

The book has, however, a disastrous shortcoming, one which reflects the whole climate of American intellectual life: it deals with religion and politics by having separate sections on each. It is enlightening to read of the political ideas of Hinduism, Buddhism, Judaism, Protestantism and Islam, but it is frustrating to discover in the sections in which politics is analyzed and action proposed almost no explicit reference to religious conviction. The principles and actions there set forth and the analyses offered presuppose other and more confused beliefs than those which the religious section propounds. The impression created—that religion is theory and that only social scientists deal with practice—is a reversal of the actual situation (at least of that which prevails in Protestant theology).

The weakest books of the five are *Democracy's Manifesto*, by William O. Douglas, which is simply a rousing piece of high-grade journalism packaged expensively between hard covers, and *Power and Civilization*, which bears the subtitle "Political Thought in the Twentieth Century." The bulk of the latter is made up of short quotations from 45 politicians and thinkers to illustrate the movement from 19th century liberalism to the complex spectrum of today's thought born of the crises of two wars and a depression. The authors link the quotations with interpretive essays, but their powers of conceptualization are not strong enough to give the book a clear profile. The impression both these books give supports the mood of liberal idealism, but without much analysis of its problems. Justice Douglas' volume includes a trenchant criticism of our failure to impart this idealism to the peoples of Asia.

In sharp contrast stands Otto Kirchheimer's massive study *Political Justice: The Use of Legal Procedure for Political Ends*. In the tradition of German scholarship Kirchheimer is painfully objective and thorough, and he carefully refrains from value judgments even when dealing with the most outrageous violations of judicial autonomy by political power. He includes a section on asylum and clemency and advises us that these no less than political trials and manipulation of the courts constitute political interference with legal procedure. In a conclusion bordering on cynicism he states that political justice at least gives the defeated a chance to protest before he is hanged. Political justice "is necessary and beneficial because without the intercession of the judicial apparatus the fight for political power would continue as relentlessly, but it would be less orderly." "Necessary and beneficial"—nonetheless the book is dedicated to the victims of political justice, and a cold passion for true justice informs it. Its discussion of "judicial space" in totalitarian societies as well as more democratic ones is a magnificent analysis of the natural operation of independent objective law and its judiciary in the face of political attempts to bend it to other ends. Kirchheimer is too aware of the ambiguities of all pretensions to justice to say outright that the law will win and the political agent fail. But the book is a part of the fight. Perhaps here too a grace is at work which we would do well to take account of.

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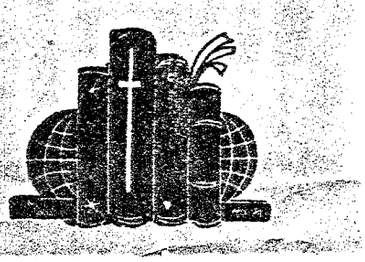

[Christian Century
Aug 7, 1963]

Vol. 30, No. 1, Autumn 1962

Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

What is Political Justice? In a sense all administration of justice, criminal and civil, is political, as it serves to maintain and at times to change, the social and political order of society. Kirchheimer deals with political justice in its more specific sense—the use of the law and the courts directly to influence the struggle for political power. Even in this narrower sense the term refers to a wide variety of phenomena, ranging from the judicial prosecution of the alleged revolutionary or traitor to the use of the courts by the political opponent who forces a member of the governing group into a defamation suit. This variety of forms in which political justice can appear is vividly illustrated by the author in the opening chapter of his book, in which he presents a concise historical survey and a detailed description of some typical political cases of recent times. The use of an accusation of common crime to discredit or destroy a political opponent is illustrated by the attempt of the Kentucky Democrats in the 1890's to wrest the governorship from the Republicans by preferring a specious murder charge against the Republican leaders. The story of this long forgotten, but by no means atypical, episode of American politics is instructive as well as thrilling. The equally specious, but successful, attempt of Clemenceau and Poincaré, through a treason charge to prevent Caillaux from attaining political power during World War I, and from using it to bring about a compromise peace, stands for what may be called political justice in its purest form. How a regime can be undermined by forcing a member of the governing group to defend himself against libelous charges before a judiciary sympathetic to the libellant's cause is demonstrated by the case of Friedrich Ebert, first President of the German Republic after the collapse of the monarchy.

While trial can thus serve as a weapon of attack, it is more frequently a weapon to defend an existing regime or government against its opponents. Political justice is a typical weapon of what Kirchheimer calls "state protection," meaning the protection of the regime or government in power. It is not the only weapon. A government may dispose, and often enough has done so, of its real, suspected or manufactured enemies without interposition of the judiciary. Administrative arrest and protective custody in a concentration camp are but illustrations from our own times. They have been used not only by fascist, national-socialist or communist regimes, but during World War II by Great Britain and the United States.

Observing political justice as a means of state protection leads Kirchheimer into a discussion of state protection in general, especially the dilemma that presents itself to the modern liberal-constitutional state where it is, or believes itself to be, in serious danger from an "opposition of principle," especially by opponents of the very bases of democracy, constitutionalism and individual liberty. Such enemies, in our days fascist and communist, want to make use of those very liberties of democracy which they are bent to destroy. How far can a democratic state go in its efforts to protect itself against such enemies without destroying its own foundations? How can state protection be squared with freedom of speech? What Kirchheimer has to say on this disturbing problem stands out among the mass of recent writing. Here, as in all other parts of his book, Kirchheimer draws on vast material taken from many parts of the world. The radical measures of the Federal Republic of Germany, finding itself directly confronted with efforts of communist penetration from East Germany, are contrasted with the cavalier attitude of Great Britain, believing itself to be immune. The vacillating, and at times frantic, American outbursts are shown to be due less to real danger than to politicians' attempts to ride a probably overestimated wave of popular fear and insecurity. Kirchheimer believes that at least some of the American advocates of radical measures may have felt that the harshness of their legislative proposals would be softened, or even declared unconstitutional, by the courts. To some extent this expectation has indeed been borne out, especially through the attitude taken by the United States Supreme Court in *Yates v. United States*.[1] That case has not been the last word in the political struggle about anti-subversive legislation. In later cases the Supreme Court itself has taken a more rigid approach, and local courts have frequently tended to lean in that direction.

Reviewing the broad scale of attempted state protection in the past and present, Kirchheimer reaches the conclusion that most of the measures are unnecessary where the opponents are insignificant, and that they are, in the long run, ineffective against an enemy representing the majority of the people struggling against a governing minority regime or a colonial power. In such generality this judgment appears too broad. It applies only to liberal constitutional regimes that have opened themselves to democratic ideology and lost faith in the justifications of their own rule. In our days such softening has gone so far as to result in the voluntary abdication of colonial rule. But where

[1] 354 U.S. 298 (1957).

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there is a strong will to maintain power, minority regimes have been able to survive attacks from within as long as they have not been accompanied by defeat by the external enemy. The Czarist regime of Russia even managed to survive the defeat by Japan in 1905; it did not fall until the total defeat by Germany in 1917. Austria-Hungary survived all attacks by Czech, Yugoslav and Italian nationalists until the defeat in World War II. If, along with Kirchheimer, one regards pre-World War I Germany also as a country where a majority of the people was lorded over by a minority, it might be added as another illustration. However, the German example tends to indicate that the dichotomy, minority-majority, may be too simple. Not even the Social-Democratic Party which, as a matter of fact, never achieved a majority vote, constituted in its totality an opposition of principle. A government may well be drawn from a minority of the people and the majority may be content with, or at least acquiesce in, that situation. The futility of the half-hearted German attempt of the 1880's to suppress the Social-Democratic Party can indeed be used as a prime example of the problematic relationship between liberal constitutionalism and efforts at state protection. The German case does not constitute an example of the futility of vigorously attempted state protection against a popular majority. Neither was the majority opposed to the existing system, nor did that system ever undertake a full-fledged effort at determined suppression of even its declared enemies. Such an effort, if it had ever been undertaken, might well have run into trouble not only because it would have been contrary to the political climate of liberalism, but also because it could hardly have expected the full co-operation of the judiciary, which, as shown by Kirchheimer's own illustrations, was little inclined to harshness against such leaders of opposition as Bebel and Liebknecht.

Neither in Germany nor in the United States or other non-totalitarian countries have the courts corresponded to that communist over-simplification in which they appear as mechanical tools of the government—both government and courts simply constituting weapons of the ruling class in its struggle to keep down the exploited class. Neither, of course, have the courts been the never-flagging champions of individual freedom against governmental suppression, as they have occasionally appeared in Anglo-American oratory. Reality is more complex. Its sociological analysis by Kirchheimer is penetrating. Why do governments resort to courts at all? Why do they run the risk of being rebuffed by the courts and the danger of the political trial being used by the accused and his group as a public forum of the potentially highest efficiency?

These questions are answered by Kirchheimer in a searching analysis of the role of courts not only in political trials but in society in general. Obviously influenced by Max Weber, Kirchheimer finds the key in the deep human need for justification of the use of power. In order to be accepted, and thus to be stable, power must be felt to be "legitimate," *i.e.*, to correspond to postulates

accepted as self-evident. In our age, in which the exercise of power, in order to be accepted as legitimate, must be demanded by, or at least correspond to, reason, the reasonableness of the exercise of governmental power must be visibly demonstrated. This task of legitimizing in individual cases the exercise of governmental power, especially when it is directed against an alleged enemy, falls to the courts; the judges are the legitimizers of the exercise of governmental power. This insight proves itself a veritable key to the clarification of the problematic role of the judiciary in the political fabric.

Courts cannot serve as legitimizers of governmental power unless they can follow their own judgment independent of the views of the government. Here then lies the root of the democratic postulate of an independent judiciary. But, on the other hand, no state could survive a decided hostility of its judiciary against its government. A dramatic illustration of such a case is afforded by the German Weimar Republic. Hence the problem of finding the right balance between judicial independence and judicial obedience to the law. No hard and fast solution can be stated. The answer must depend on varying circumstances of time and place. How great the variations have been in the measure of success, and how manifold are the available means of formal and informal nature, is extensively shown by Kirchheimer. Modes of judicial appointment, tenure, appeals, administrative controls, personal background, relations to the public, both in general respect and in special relation to the political case, all come under scrutiny. The inquiry is extended to the role and position of the other actors in the judicial drama: the prosecutor, the attorney and the accused. For the accused the political trial can present a much desired opportunity to publicize, dramatize and propagandize his cause and thus to defeat the very enemy by whom he is prosecuted. But promotion of the cause may be fatal to him. Shall he save his own skin by turning informer or traitor to the cause? The dramatic dilemma is illustrated by numerous contemporary cases as well as by the two most momentous political trials of our history, those of Jesus and Socrates.

What are the peculiar tasks of defense counsel in the various types of political trial? Is it his first task to serve his client, or is he to promote the cause? The two tasks can be incompatible.

What, furthermore, is the role of the prosecution? How is the prosecutor's position to be organized if it is simultaneously to serve the government and not to compromise the people's confidence in the administration of justice? What are the motivations for the decision of whether or not to prosecute, and, in the affirmative situation, of how to "dress up" the case?

All these problems are discussed on the basis of a large amount of material taken from constitutional countries such as the United States, Germany, Switzerland, France, Great Britain and South Africa. But how do the problems present themselves in a totalitarian country? The German Democratic Republic (*i.e.*, East Germany) serves as a richly documented illustration of the

several techniques—formal and informal, crude and subtle—for the achievement of a situation in which the courts, like all other organs of state and party, are to function as reliable executive organs of an all-powerful regime bent upon remolding an entire people in accordance with an ideology regarded as ultimate truth. This fascinating description is followed by a survey of turns in Soviet theory on revolutionary legality, which, however, does not extend to those latest tendencies which may conceivably foreshadow a considerable intrusion of lay elements into the administration of Soviet justice and, perhaps, a growth of judicial independence.

A chapter of some fifty pages is devoted to "trial by fiat of the successor regime," amply illustrated by cases from widely diverse places and periods. The trial of representatives of the defeated by the victorious regime appears to be a common, and probably inevitable, phenomenon. Kirchheimer uses the case to explain the essential difference between the trial and the action which for propaganda purposes is called a trial but partakes more of the nature of a spectacle with prearranged results. But even in such administration of justice, gradations exist. In the courts-martial of the Vichy militia and the people's tribunals of the first liberation days, enemies, whose fate had been settled in advance, were butchered. The liberation type of *cour de justice*, with all its prejudices, allowed for some primitive rights of defense. The elaborate military commission set up by the United States for the trial of such Japanese "war criminals" as General Yamashita is said to constitute a marginal case. The Nuremberg trial before the International Military Tribunal is regarded as a true rather than a merely simulated trial. The Nuremberg case is extensively discussed, but, in contrast to the general character of Kirchheimer's inquiry, the refutation of the critics moves more along legalistic than political lines. Whether Nuremberg has produced, as Kirchheimer hopes, the positive result of a lasting condemnation of the use of inhuman practice in the political struggle may well be doubted. As pointed out by the author himself, the Nuremberg indictment was directed primarily against the National-Socialists' attempt to subjugate Europe by force of arms, and only incidentally against the practices used in the pursuit of this aim. Inhuman acts unconnected with the war were expressly excluded by the Tribunal from its scope of jurisdiction. More convincing, on the other hand, are Kirchheimer's arguments against the proposals to call in neutral judges in the condemnation of the National-Socialist rulers of Germany by their Allied successors, or to leave their condemnation to German courts.

In the chapter following, Kirchheimer investigates the role played in political justice by the corrective institutions of asylum and mercy. Asylum signifies the limitations imposed on political power by the limits of its territorial spheres. What are the considerations motivating a government to grant or to refuse asylum? What were the policies of the several nations in the nineteenth century, when the asylum seeker was typically an individual? What are they today when the search for asylum has come to be the concern of vast groups of persons persecuted not only on grounds of political creed or activity but on grounds of nationality, race or social origin?

What, finally, are the complex and widely varying motives for granting or denying mercy to individual victims of political justice, or amnesty to entire groups? The comparison of Lincoln's practices with those of contemporary American administrations is as fascinating as the analysis of attitudes of Shakespearian characters, of Tudor and Bourbon kings, or of successive French and German regimes.

In summing up Kirchheimer returns to the comparison of political justice in constitutional and totalitarian regimes. In the former the existence of a "judicial space" is essential if the "detour" of the resort to trial is to fulfill its function of legitimating the governmental prosecution of the political foe. Only if the courts are left a space of freedom to exercise their own, though perhaps narrowly defined, judgment can political justice be expected to achieve its assigned end. There must be some risk of divergency between government and court, and thus some risk of the trial being used by the accused as a forum for effective advocacy of his cause. Where no such judicial space is left, the political trial can serve only the different functions of a potentially highly effective means of a totalitarian government to educate the populace along the ways desired. Whatever the regime, political justice "is bound to remain an eternal detour, necessary and grotesque, beneficial and monstrous."[2]

This final judgment expresses the well-balanced nature of Kirchheimer's investigation of a topic that easily provokes partisan approach. Kirchheimer leaves no doubt about his own convictions as those of a democratic, liberal constitutionalist. But through his comprehensive knowledge of history he is familiar with the complexity and inevitability of the problem. He pursues it not as the pleader of a cause but as a scholar in search of knowledge and understanding.

Kirchheimer is a political scientist and a sociologist. He looks at the phenomenon of political justice from this outside point of view rather than from the inside position of the lawyer.[3] It is exactly this approach that makes his work fascinating and important for the lawyer. The impact of the inquiry is due not the least to the comprehensive scope of the author's material. Political justice has been treated in a flood of writing, especially in recent years when it has become such a widespread and disquieting phenomenon. The number of American discussions of American cases, practices and problems has been legion. Nowhere else can the reader find such a wealth of material as in Kirchheimer's book. Consequently, the approach is from a higher level; phenomena and problems of one country are reflected in those of another. Thus new light is thrown upon the familiar phenomenon. The inquiry cuts down

[2] P. 430.

[3] The fact that the author is not a lawyer has found expression in his unorthodox and at times annoying mode of citing cases, American and foreign.

to fundamentals. The book constitutes a high achievement of comparative law as well as of jurisprudence. Law teachers might well consider its use as a base for discussion in seminars or courses on jurisprudence. For one striving at clarifying his thoughts about the problem of how to defend our social and political system against its enemies, without in the effort undermining its very foundations, Kirchheimer's book is, I dare say, indispensable. To the judge, attorney, or prosecutor involved in a political case, it will serve as a useful practical guide.

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« boîte à lettres » et les cabinets « tentaculaires » (p. 306). L'auteur s'attache également à décrire les relations des fonctionnaires et des parlementaires ; dans un passage d'une grande finesse psychologique, il compare leurs optiques, leurs préoccupations et leurs comportements et insiste, fort justement selon nous, sur le fait que leurs attitudes respectives sont plus complémentaires qu'antagonistes.

L'ouvrage s'achève sur un des thèmes fondamentaux de la science administrative, celui des rapports entre administration et public et on ne peut que souscrire aux vues de l'auteur sur la nécessité d'« ouvrir l'administration sur l'extérieur ». C'est en cela, à notre sens, que réside la véritable réforme administrative.

Au total, *Le fonctionnaire français* peut être d'ores et déjà considéré comme un classique de la « littérature administrative ». Sans être un ouvrage de science administrative au sens étroit du terme, il offre un témoignage dans lequel chercheurs et fonctionnaires trouveront maints thèmes de réflexion.

Souhaitons que R. Catherine n'en reste pas là et que, poursuivant et développant les analyses contenues dans ce livre, il nous présente bientôt un bilan des problèmes de l'administration française. Sa triple qualité d'administrateur, de professeur et de directeur de la *Revue administrative* lui donne des titres particuliers à entreprendre une telle synthèse.

Bernard Gournay

KIRCHHEIMER (Otto) — *Political justice*. The use of legal procedure for political ends. — Princeton (N.J.). Princeton University press, 1961. 24 cm, XIV-452 p. Index. $ 8.50.

Voici un ouvrage de grande valeur dont il faut espérer une prochaine édition française. Pour s'attaquer à un tel sujet, l'auteur devait être à la fois juriste et politiste, avoir une large culture historique et un sens aigu des réalités de notre temps. Otto Kirchheimer remplit parfaitement ces conditions. De plus, sa triple expérience de l'Allemagne, de la France et des Etats-Unis, où il occupe une chaire de science politique à la Columbia University après avoir été pendant de longues années chargé des affaires européennes au Département d'Etat, lui a permis de se placer tout naturellement dans une perspective comparative et de tenir compte à chaque instant de la tradition juridique et idéologique du pays considéré. La richesse de la documentation est étonnante. Les références à la France, par exemple, ne comprennent pas seulement des livres du XIX^e^ siècle ou des traités de droit, mais aussi les analyses de Casamayor, les articles de J.M. Théolleyre, les prises de position de M^e^ Halimi dans les *Temps modernes*, incorporant encore le bilan « Les atteintes à la sûreté des Français » paru dans *Esprit* en mars 1961. La documentation allemande ou américaine est aussi variée et aussi à jour.

Pour exposer les résultats de ses recherches et de ses réflexions, Kirchheimer a rencontré une difficulté classique : comment faire comprendre la complexité d'un cas sans se perdre dans les détails ? Comment systématiser

sans renoncer à l'analyse minutieuse ? Il l'a résolue par un compromis qui a l'avantage de rendre la lecture à la fois variée et constamment intéressante, et l'inconvénient de faire perdre parfois le fil du développement, retenu qu'on est pendant un long moment par l'exposé détaillé d'une affaire particulière. L'auteur entremêle en effet l'exposé synthétique et la présentation par la méthode des cas. C'est ainsi que, sur les six sections du chapitre III, « Le procès politique », cinq sont systématiques. Mais après « Procès politique et procès criminel » et « Le procès pour meurtre comme crime politique », on trouve « Etudes de cas pour la signification de la trahison » avec une présentation originale de deux procès célèbres, l'affaire Caillaux ou le cas de « l'opposition comme trahison » et le procès en diffamation intenté par le président Ebert contre un journaliste de droite. Parfois, c'est la majeure partie d'un chapitre qui est consacrée sinon à une seule affaire, du moins à un seul pays : le chapitre « Le "centralisme démocratique" et l'intégration politique du judiciaire » porte presque uniquement sur l'organisation de la justice en Allemagne de l'Est et la moitié du chapitre « Jugement par ordre du régime successeur » parle du procès de Nuremberg. Mais qu'il s'agisse d'exposé systématique ou d'analyse de cas, jamais Kirchheimer ne verse ni dans l'abstraction gratuite ni dans le récit anecdotique.

Le livre est divisé en trois parties inégales, la troisième traitant de deux sujets qu'on ne rattache pas d'habitude à la justice politique : le droit d'asile et la clémence, cette dernière incluant les divers types d'amnistie. Qu'est-ce qui caractérise donc cette justice politique dont le contenu et les méthodes sont étudiés dans la première partie ? C'est une justice où « l'action de la Cour est mise en œuvre pour exercer une influence sur la distribution du pouvoir politique ». Cette action peut être amenée par un gouvernement contre ses ennemis politiques, par un régime, contre ceux qui le mettent en cause, par les adversaires des gouvernants pour les discréditer, etc. L'utilisation de la procédure est parfois plus déterminante que le contenu de l'accusation pour savoir s'il y a procès politique (affaire Calas, affaire Kravchenko, etc.) De plus, l'état de l'opinion, la nature de l'idéologie dominante, les mécanismes institutionnels eux-mêmes interviennent sans cesse dans l'élaboration et l'interprétation de la loi. Ainsi le simple désir d'un changement constitutionnel a longtemps été considéré comme un délit. Dans la plupart des pays « occidentaux », il n'en est plus ainsi. En revanche, toute une philosophie juridique de l'atteinte à la sûreté de l'Etat, de la subversion non seulement exécutée mais projetée s'est développée dans les Etats qui se veulent les plus libéraux. Kirchheimer analyse la loi fédérale suisse de 1950 et l'affaire André Bonnard qui en fut résultée (un professeur à l'Université de Lausanne avait communiqué des renseignements sur la Croix-Rouge suisse au Mouvement de la Paix). Il s'étend plus longuement sur l'étrange situation de la République fédérale face à l'Allemagne de l'Est, étudiant notamment les affaires John et Agartz. Il consacre un chapitre entier à « la répression légale d'organisations politiques » en partant de nombreux cas du XIX^e^ siècle pour aboutir à un examen serré des critères de répression utilisés contre les groupements con-

sacrés comme antidémocratiques. Dans le cas de l'action anticommuniste aux États-Unis et en Allemagne, le verdict de la Cour, dans la mesure où il est fondé sur la doctrine du groupe incriminé plutôt que sur son action devient, selon la formule du juge Jackson, « une prophétie sous forme de décision légale ». Les conclusions que Kirchheimer donne à ce chapitre sont pondérées à souhait.

La seconde partie est consacrée aux acteurs : le juge, l'accusé, le défenseur, l'État. L'auteur montre l'influence qu'exerce sur la justice politique la sociologie de la magistrature. Dans sa conclusion générale, il insistera de nouveau sur le rôle particulier des magistrats : il y a changement de régime (il cite Pasquier disant en 1850 : « je suis l'homme de France qui a le plus connu les divers gouvernements qui se succèdent : je leur ai fait à tous les procès ») et sur la notion d'« espace judiciaire », c'est-à-dire de pouvoir d'appréciation laissé au juge par le pouvoir ou par l'idéologie dominante. Le comportement de l'accusé est surtout intéressant à étudier à propos de sa volonté d'identification à un groupe, tandis que le problème de l'avocat est celui de l'identification à la cause politique du client. Nous ne pouvons pas entrer dans le détail de considérations dont la pertinence et l'actualité sont saisissantes si on les applique à la France des années 1960.

On peut bien entendu regretter que tel ou tel aspect auquel on attache soi-même de l'importance n'ait pas été mieux mis en évidence. Ainsi la notion de légitimité, ainsi le concept de trahison. Tel ou tel passage peut aussi paraître insuffisant. Les quelques pages consacrées à la justice sous le IIIe Reich sont bien rapides. On doit aussi déplorer l'absence de [illegible] ayant entraîné des conclusions qui montrent à la fois la faiblesse et l'utilité de la justice politique. La faiblesse est généralement admise. Qui ne dirait avec Kirchheimer : « S'il est vrai que le jugement peut entrer dans l'histoire, il est rare qu'il devienne le verdict rendu par l'histoire elle-même » ? L'utilité résulte déjà de la supériorité que la procédure présente par rapport à l'arbitraire pur. Elle provient aussi des répercussions du procès sur l'opinion et, par contrecoup, sur la répartition des forces politiques. La caractéristique fondamentale de ce livre si riche et si stimulant est peut-être d'être vraiment un ouvrage de science politique, c'est-à-dire de tenir compte de toutes les dimensions psychologiques, sociologiques et institutionnelles d'un sujet en apparence purement juridique.

Alfred GROSSER

WALKER (NIGEL) — *Morale in the Civil service*. A study of the desk worker. — Edinburgh, the University press (1961). 22 cm, X-302 p., tabl., pl. Index. 30 s.

L'étude que vient de publier N. Walker représente une remarquable contribution au développement de cette discipline que l'on qualifie non sans quelque outrecuidance de science administrative. Elle montre, après les enquêtes de

of the triumphs of Austrian dancers in England and America. Hugo Zelzer presents an admirable survey of the comparative history of music in Great Britain and Austria during the Baroque period, analyzing clearly and convincingly the various differences and points of contact. But these and other pieces of gold are, regrettably, likely to be lost in the mass of baser metal.

Concordia Senior College PAUL W. SCHROEDER

KIRCHHEIMER, OTTO, *Political Justice, The Use of Legal Procedure for Political Ends*. Princeton, N. J.: Princeton University Press, 1961. Pp. ix, 452. $8.50.

This is an interdisciplinary study. It is concerned with the operation of courts, and offers conclusions as to the nature of judicial process. It also belongs to that branch of jurisprudence which attacks legal processes in terms of social processes. Its central question is, however, the exercise of power, and as such the book falls into the category of political science. Historically, Mr. Kirchheimer's book is focused primarily on our times, and in spite of occasional reference to the trials of Christ, Socrates, or Joan of Arc, and to Roman legislation, our author is concerned almost exclusively with our times, modern society and modern politics. It also deals with political trials in the Soviet world.

Having gone into all these various aspects of the administration of political justice, our author offers a series of rather pessimistic appraisals. In his opinion the so-called independence of courts and objective justice is a myth without practical significance. The judge is not concerned in political trial, nor even in the regular operation of courts in the enforcement of the law. In Western societies, under a more or less liberal system of government, courts are not law- but opinion-directed. In the Soviet Union judges follow the party line. Although mechanics of infiltration of the political principle into the judicial process differ in those two civilizations, the result is not a difference in principle of judicial action. There is only an "appreciable difference" in judicial ritual between the two approaches. However, our author comforts us Westerners with the thought that the defendant feels better in Western courts than when face to face with Soviet justice.

For the general reader of this publication the treatment of the political uses of courts in the Soviet world is of special interest. Unfortunately, this aspect of the book is easily the weakest. It is not based, probably for linguistic reasons, with the exception of East Germany which serves as the central example for the entire system of socialist countries, on the study of original material. Consequently, some of the most important political trials in the Soviet world have escaped the author's attention, or at least the detailed analysis which they deserved. In consequence, the author, who all too frequently indulges in an impressionistic terminology, has failed to grasp the essential fact in the fate of political justice in the Soviet Union, namely that under Soviet rule there is dividing line beween political and non-political crimes.

Another criticism, which the reviewer feels compelled to offer, concerns some of the theoretical formulations advanced in the book regarding the nature of judicial action. The theory of hunches, which in the author's view substitutes for the rule of law, is at least of dubious validity. This is obviously not the place to go into a detailed analysis of this theory, which is neither invented by the author nor of recent vintage. It is enough to say that the theory of hunches is totally refuted by the history of the role of the courts in the reform of civil, criminal and administrative law on both sides of the Atlantic, both in the

countries of the civil law tradition and under the rule of common law. It is indeed a well-known fact that courts have departed from the literal and formal interpretation of the letter of the statutes and of the judicial precedent. Recently, this process has been magnificently described by the great master of American jurisprudence. The courts, by the new approach to law enforcement, have not disregarded the rule of law, but have striven to adapt it to new social and economic conditions. The result is not a system of responses to hunches, but a modern legal system.

World Rule of Law Institute KAZIMIERZ GRZYBOWSKI
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LEHNING, ARTHUR, ed., *Michel Bakounine et l'Italie, 1871-1872: Première partie: La polémique avec Mazzini, écrits et matériaux.* Archives Bakounine/Bakunin-Archiv, Vol. I. Leiden: E. J. Brill, 1961. Pp. lv, 353. 55 guilders.

This is the first volume of a projected complete edition of archival material pertaining to Michael Bakunin in the Institute for Social History in Amsterdam. This enterprise is commendable. Hitherto, scholars have had to depend chiefly upon Max Nettlau's hectographed biography, *The Life of Michael Bakounine. Michael Bakunin: Eine Biographie* (3 vols.; London: privately printed, 1896-1900), and upon the six-volume *Oeuvres*, edited by James Guillaume in collaboration with Nettlau (Paris: P.-V. Stock, 1895-1913), which covered many of the Russian anarchist's writings between 1868 and 1872. Guillaume wished to add a seventh volume containing Bakunin's papers pertaining to Italy between October 1871 and March 1872, but the Paris publishing house went out of business, Guillaume's manuscript was turned over to Lucien Descaves, who could not find a publisher. In June 1935 Lehning and Nettlau met Descaves and made plans to publish the "seventh" volume in Leiden. Unfortunately, Nettlau's death in Amsterdam on July 28, 1940, caused scholars to wait another score of years for Lehning to fulfill the project.

In its present handsome format the collection is better than that envisaged by Guillaume, because the Amsterdam research institute meanwhile was able to acquire many additional documents. Moreover, Lehning has availed himself of documents housed in libraries and archives in Milan, Bologna, Florence, Rome, Paris, and London. Each volume in the present series will be devoted to a single theme and will be arranged chronologically so far as possible. Assisting Lehnert in the project are A. J. C. Rüter of Leiden and P. Scheibert of Marburg. Financial aid has come from foundations in Germany, the Netherlands, and the United States.

The editors have prefaced their collection with a long essay explaining the complex three-cornered ideological contest in Italy in the months after the Paris Commune—a period which saw Bakunin engage in vigorous polemics with both Mazzinians and Marxists for leadership of the sundry Italian workingmen's associations. The documents that figure largest in this collection are Bakunin's variant drafts of "La théologie politique de Mazzini et l'Internationale."

The editors make numerous references to the major studies of this era, including the recent one by the American, Richard Hostetter, *The Italian Socialist Movement: Origins, 1860-1882* (Princeton: D. Van Nostrand, 1958) [reviewed in *JCEA*, XII (July 1959), 189-190]. The editors also demonstrate familiarity with the relevant and important studies of Nello Rosselli, Aldo Romano, Franco

Temple Law Quarterly Summer 1962

BOOK REVIEW

POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. By Otto Kirchheimer. Princeton, N.J.: Princeton University Press, through a grant of the Ford Foundation 1961. Pp. xiv, 439. $8.50.

Every age has its priority of abstract terms for regulating public affairs; and in that list each age assigns definitions and the measure of importance it recognizes in every term. Certainly the words "politics" and "justice" always appear for valuation, but the worth given the one or the other has varied widely. In the twentieth century, which might be regarded as an extended laboratory seminar in Politics, that term has come to the top of the list of priorities, while Justice has sunk in the common estimation of the learned. So disparate is the estimation of the age that only Politics has a generally understood definition. It is the means whereby a group manipulates, through guile or force, persons and events in order to secure control and authority in an organization. Principles and policies in this century's use of Politics are reduced to being the mere tools of guile whereby power is delivered over to one faction in preference to another.[1] But Justice—ah, what of Justice? When principles and policies lose their significance as ends, what can be Justice?

It is within the context of this unequal apportionment of meaning that Dr. Kirchheimer, Professor of Political Science at Columbia University, has set out to discuss the concurrence of Politics and Justice in a phenomenon which is called "Political Justice". As is the way with so much scholarly writing, he leaves his basic terms to be understood by the reader, just as though he were writing for a universal elite in the style of Thomas Aquinas or even Erasmus. But of course there is nothing universalistic about today's reading elite, except their geographical location; and it is not quite fair to leave to tacit assumption the basic definitions with which one's work must deal. Even assuming that every twentieth century participant knows what Politics is, it cannot be presumed that he will share any single definition of Justice with his fellows. Ergo, what is Dr. Kirchheimer talking about?

Justice is a concept that has been mooted since the Sumerians; so far as recorded history is concerned. About 2050 B.C., Ur-nammu, King of Ur, set out a law code intended to insure Justice in the land and promote the welfare of its citizens. Because these were pragmatic people not given to discourse on a high level of abstraction, the laws confine themselves to protection of the weak against the economically strong, the fisc against corruption, the ignorant against the knowledgable, and to assuring punishment to perpetrators of physical harm. It is what every law code since has sought to accomplish; and it implicitly contains an absolute concept of Justice against which conduct can be measured.[2] But if Justice to the Sumerians was implicit and pragmatic, it was to the Greeks a subject for intellectual play. And the rules of their game have been the rules of the discussion ever since (1) Anaximander defined Justice as an element warring upon Injustice, which must absolutely overpower its opposite to be secured, and (2) Heraclites, in reaction, defined Justice as the balance struck between contending forces, whose function it is to prevent encroachment by one contender upon another.[3] Between these opposites all subsequent thinkers have taken, or been assigned, their array: Justice is either one or two major contenders in the arena of life fighting to destroy its enemy, or Justice is something apart from the contenders in the arena serving as a referee whose job it is to prevent total victory by one at the expense of total defeat for the other. The pragmatic man, like the Sumerians, simultaneously employs the two meanings, for he is prepared to see life as the site of the warfare between Light and Darkness and, concurrently, life as the place wherein many battles are fought out between many antagonists of whom none entirely represents either Light or Darkness. But somewhere, somehow, *some* definition of Justice must exist, or authority is without a base and law is merely arbitrary power.

Dr. Kirchheimer diffidently approaches the problem of Justice, awed by the contemporary, conflicting opinions whose proponents he doubtless admires and whose current acceptance he seems reluctant to challenge. He says, "Like every other office holder, the judge carries the burden of the regime; when the regime tumbles, he must be able to stand on the actions he took in the concrete situation, rather than on the broken shield of a possible iniquitous enactment."[4] This is very Existential, especially when joined with a statement that a judge of a deposed regime, who had enforced the laws of the old order during the days of its ascendancy, should be condemned by the new order only where he had acted in "bad faith" or had enforced "manifestly unjust law."[5] He says, too,

> It has been shown how difficult it will be in the future to have recourse to violent Political change on a state-transcending level without at the same time creating situations that lead to the very negation of the "human condition". * * * [F]act situations * * * have established signs, imprecise as they might be, that the most atrocious offenses against the human condition lie beyond the pale of what may be con-

1. In our time politics is merely the securing of power for its own sake, see LINDNER, MUST YOU CONFORM? 162-164, 171-172 (1956).

2. KRAMER, HISTORY BEGINS AT SUMER 51-55 (1956).

3. BURNET, EARLY GREEK PHILOSOPHY (4th, Lorimer, ed., 1930), 54n, 165.

4. KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 425 (1961).

5. *Id.* at 328n.

sidered contingent and fortuitous Political action, judgment on which may change from regime to regime.[6]

In this language Dr. Kirchheimer seeks to stand aside from the merely political in order that he may say, "And, too, there is the famous sense of Justice: the ability of power holders to detach themselves from the pressures and necessities of the moment and look at human affairs with greater serenity. This sense may hover more distinctly over the whole complex than our search for rational determinants of action might let us admit."[7] Jean-Paul Sartre himself might have written any of it, but the very ethical formlessness that has driven Sartre to espouse Marxism as the core of a peripheral Existentialism undercuts this writing.[8] Such phrases as "burden or the regime", "actions in the concrete", "the broken shield of iniquity", "bad faith", "atrocities against the human condition", "sense of Justice", and "serenity" add up to poetry and not legal writing. What is their applicable content and what does it mean? Insights poets *may* have, but ambiguity they certainly *do* have; and, while ambiguity enriches a poem, it can bankrupt a law. Certainly Dr. Kirchheimer is rich in ambiguity and poor in certainty, as well as predictability.

Though he stands with Sartre, he stands also with Bertolt Brecht who tells "the friend of Justice to consort with any, to commit every baseness in order to eradicate baseness forever". Brecht pulls no punches when he cries:

> Be prepared to wade in filth,
> Embrace the butcher, but
> Change this world—it cries out for it![9]

In commenting on this, Dr. Kirchheimer says,

> The balance between community and judge has emerged as a dynamic one. It changes with the sociopolitical structure of the particular society and has a variable margin in which the pressures of the day and the inchoate data of public consciousness are translated into judgments on individual situations submitted for examination. Under such conditions there are unavoidable differences between executive policies and the judge's interpretation of the general rule merging with his understanding of the concrete situation. While they are not the rule, these differences flow logically from the arrangements of a society which visualizes the resultant friction as an active contribution to the well-being of its members. Some sphere of not-officially-controlled individual activity, if by no means safely guaranteed, is at least facilitated as long as some gaps are likely between the political executive's and the judiciary's understanding of the situation.[10]

Justice is reduced to a margin of difference between the executive and the judiciary, and that margin can exist only "while differences are not the rule" and can survive only so long as the "gap" exists. To say that Justice is "by no means safely guaranteed" is an understatement. But Dr. Kirchheimer puts himself particularly on the side of Brecht, after all, by his choice of the George Grosz cartoon for his dust-jacket. In it, a people's court (composed of a worker, a peasant woman, and an intellectual reminiscent of Lenin, sitting under what looks like a laureled, bandaged portrait of Karl Liebknecht) judges a group of junker officers and reactionary bureaucrats marked by dueling scars who are arraigned in chains and guarded by workers' militia. The caption reads, "Wie der Staatsgerichtshof aussehen müsste!", which this reviewer reads, "What the Tribunal for the Protection of the Republic ought to look like, (if the situation were as it should be)!"[11] Now what therefore do Brecht and Grosz mean, and what is the worth of Dr. Kirchheimer's "gap"?

In describing the Communist judge in a Communist state, he says the judges' true test is

> * * * in the frequency and intensity of the judges' voluntary, spontaneous identification with the * * * political leadership. Facilitating the identification is a tendency to visualize the judge no longer as a creator of individual decisions, but as a member of a social collective in which his own person and individual efforts submerge. All societal differentiations would become submerged in universal identity, wherein the mind of the "judicial collective" unconsciously but unremittently communicates with the all-pervasive mind of the government * * *.[12]

Herein the "gap", which is Justice to Dr. Kirchheimer, disappears; although if the government is itself in solidarity with the living elements in society, then to the fathers of continental "realism", e.g. Emile Durkheim and Leon Duguit, as well as to Brecht and Grosz, the government *is* Justice. For this reason, there seems to be little justification for Dr. Kirchheimer's hope that "when the regime's major goals have been fulfilled and its spiritual and social dominion safely anchored, the eternal guard against individual slackening may be relaxed—and a referee al-

6. *Id.* at 340-341.

7. *Id.* at 349.

8. Edward Morot-Sir, *Review of J. P. Sartre, Critique de la raison dialectique*, 22 JOURNAL OF THE HISTORY OF IDEAS 573-581 (1961).

9. KIRCHHEIMER, *op. cit. supra* note 4, at 259; quoting and translating DIE MASSNAHME (1930).

10. *Ibid.*, 259-260.

11. The dust-jacket translation is in error and has been improved in a letter to reviewers by Princeton University Press.

lowed to mark points for both sides."[13] There are in the Marxist system no permanently existing values, aside from the dialectic itself; and without values no norms can last. The Marxist theoreticians are like Puritan divines having revelations on Satanic possession. Christian doctrine might be a permanent value to such divines, but the individual's safety from their revelations was not. It is for this reason that legal positivism cannot survive in a Marxist state and why the theoretician W. Artzt, who espoused it and called for a separation of party rules and law so that law might be independent, had to recant upon the making of this utterance.[14] Perhaps it is the East German novelist Uwe Johnson who understood Brecht and Marxism best when he said, "Brecht has shown us that survival outweighs any shortrange moral consideration".[15]

But Brecht aside, Dr. Kirchheimer remains most enamored of the legal-realist position. For him it is "common knowledge—one of the few gifts bestowed by all shades of legal realism to legal theory which have found wide acceptance—that * * * the judge would rather rely on his hunches, which show him the desirable decision under the particular circumstances of the case. * * * If he * * * feels the persistent urge to solve the problem before him in the light of his initial perception, he must convert the perception into a defensible and reasoned position."[16] And, of course, it is here that the judge runs into the bog of non-values, for it would appear the judge must inevitably find himself swamp-bound in Dr. Kirchheimer's system. Under his system, all the work of Western international legal organizations is doomed by their attempts "to avoid difficulties by espousing abstract legal or constitutional principles rather than concrete historical causes".[17] So what is the judge to do? Why, he is according to Dr. Kirchheimer, to test his hunch by the established precedents and norms of his society! In Dr. Kirchheimer's gruesome English, "Norms and precedents are part of the experienced, worked-out community reaction patterns of domesticating the influx of social reality that must be faced, aborbed, and shaped."[18] In a Lasswellian sense (although as usual in this book, when Lasswellian terminology is used, the citation to Lasswell is missing), "the division of state function leads to a bifurcation between norm creation and decision of individual cases, rather than to the traditional division into three powers".[19] In short, what makes courts decide issues differently is "the variance in their concept of state authority, their political experience, including the shape and structure of the community they were living in."[20] Indeed, any contrary view, which looks for autonomous certainty, must be folly, since the contrary view must serve as value-blind guarantees for any kind of status protection.[21]

But then where does this set of road signs direct the searcher for Justice in situations of litigation? Dr. Kirchheimer agrees with the legal historian Willard Hurst that courts are "interstitial", so that "only a severely truncated segment of community actions—and not always those that are most urgent—ends up in the courts";[22] and he stands further with Hurst in agreeing that law is the institutionalization of violence;[23] but the relative unimportance of the courts cannot affect the importance of the search for Justice. Indeed, though only "interstitially" used, that use may overthrow the chance for any Justice. This position is indirectly recognized by Dr. Kirchheimer in his comments on the difficulties of the Communist lawyers in the Dennis case who "knew full well that with the popular mind being presently formed by the prevailing degree of material welfare, and attuned to and willingly resounding the fare offered by the mass communication media, more representative jury composition would not have materially helped the defendants' case".[24] The problems of Justice become compounded by such an attitude because, even when the decision is by jury, the decision must be "political" rather than "just", since the juror is a mass man dominated by a mass culture formed by the mass media. "Whoever refuses to play ball, rejecting the standard political patterns of mass society, should be made to pay as heavy a penalty as anybody else who shuns mass-produced goods."[25] All of which is inescapably true—if a judge or a juror is without any system of values that transcends the mass culture, or the "community reaction patterns", or the "influx of social reality". No one made this more plan than Lenin, the only lawyer among the Bolsheviks, who approached the reformation of law in the manner of an advocate who will shift from theory to theory, even from fact to fact, in order to win his case and who, in Dr. Kirchheimer's words, put through "rigorous procedural simplifications of lawmaking to suit party needs [and] made short shrift of the sanctity of law and reduced to naught any hesitant doctrinal attempts to place the law, once promulgated with the party's approval, above shifting party decisions."[26] But in the Soviet Union, after the regime of Stalin, the first reforms called for imposed a time limit on the extraordinary appeal that the state had

13. *Id.* at 299. On Duguit, see Stone, The Province and Function of the Law 350-352 (1946); on Durkheim, 471-473; but their interdependency, 404.

14. Kirchheimer, *op. cit. supra* note 4, at 292-293n.

15. Uwe Johnson, III Atlas 142 (February, 1962).

16. Kirchheimer, *op. cit. supra* note 4, at 204-205.

17. *Id.* at 257-258n.

18. *Id.* at 205.

19. *Id.* at 179. See also the discussion of what constitutes legality at 120.

20. *Id.* at 207, citing H. D. Lasswell and R. P. Donnelly as a secondary source.

21. *Id.* at 207n.

22. *Id.* at 188. See Hurst, *Introduction* to Laurent, The Business of a Trial Court (1959).

23. Kirchheimer, *op. cit. supra* note 4, at 287n, quoting N. Lenin. See Hurst, Law and Social Process in United States History 267-274 (1960).

24. Kirchheimer, *op. cit. supra* note 4, at 222-223.

25. *Id.* at 238. At this point he is particularly good in his criticism of the bland appreciators of politics in a mass culture, compare J. R. Cushield, *Mass Society and Extremist Politics*, 27 American Sociological Review 19-30 (1962).

26. Kirchheimer, *op. cit. supra* note 4, at 288. On Lenin's advice as a lawyer to indicted comrades, see *Id.* at 245.

been able to take in any criminal or civil matter. Every year more law-trained persons come to the bar.[27] It seems the values of certainty, predictability, and limited power in the authorities can be learned through experience with the personal consequences of "objective" guilt; but this is very different from what Dr. Kirchheimer means by "individuals who have had enough opportunities to compare the judgment and presuppositions impressed on them by their environment, including the mass media, with some radically different life situations, expectations, and evaluations."[28] If this had been all there were to it, Lenin would have been right without peradventure.

Since the eighteenth century, there has been abroad in legal circles the idea that only overt acts, or conspiracy to directly perpetrate overt acts, should lead to state prosecution of the individual. Dr. Kirchheimer notes the idea but attributes it to the peculiar economic structure of the century and a half before 1914.[29] Maybe this is true; but that is not to say the opponents of such a position took that attitude. Dr. Kirchheimer makes much of the 1794 trial of Thomas Hardy, secretary of the London Corresponding Society and active in the General Convention of Corresponding Societies at Edinburgh which had sat as a proto-constitutional convention.[30] He especially comments on the charge to the petit jury by Lord Chief Justice Eyre which attacked the defense of Lord Erskine "that people have a right to alter their government" on the ground that such a doctrine "tends to * * * shake all the foundations of government".[31] Impliedly, Dr. Kirchheimer opines that it is Eyre's position rather than Erskine's which the defenders of modern democratic states must adopt; and he illustrates this with the unfortunate libel suit of Friedrich Ebert.[32] But the contemporaries of Hardy, and those political lawyers who came later, were not unaware of this problem. Interestingly enough in a copy of the State Trials, Judge John Cadwalader (who sat as a federal district judge through the Civil War in Pennsylvania) had marked the very quotation by Eyre singled out by Dr. Kirchheimer, doubtless for use in some political trial of the day. But he had done more. He had tracked down and identified as the author of a pamphlet attacking the grand jury

27. *Id.* at 265n. See also on Soviet law student statistics, Ginsburgs, *The Teaching and Study of International Law in the USSR*, 1961 ABA PROCEEDINGS, SECTION OF INTERNATIONAL AND COMPARATIVE LAW 310n, comparing 7,000 law students in Tsarist Russian schools in 1913, in 1941 in Stalinist schools with 16,400 and 37,000 in 1961.

28. KIRCHHEIMER, *op. cit. supra* note 4 at 224.

29. *Id.* at 121-132. On the legal idea itself see NOVANGELUS (1774), IV JOHN ADAMS WORKS (C. F. Adams, ed., 1851) 80-81.

30. 8 DNB 1241; 1 TRIAL OF THOMAS HARDY (Joseph Gurney, reporter, 1794) 260 *et seq.*

31. KIRCHHEIMER, *op. cit. supra* note 4, at 31 quoting, somewhat sketchily and without asterisks, 24 State Tr. 1371 (1794).

32. KIRCHHEIMER, *op. cit. supra* note 4, at 42 and 81-82 for the story of Ebert. See also *Id.* 139-141 for comment on Learned Hand's ruling.

instructions of Eyre the famous radical William Godwin;[33] and more than that he had quoted from Edmund Burke in the margin:[34]

> Public prosecutions are become little better than schools for treason, of no use but to improve the dexterity of criminals in the mystery of evasion, or to show with what complete conformity men may conspire against the commonwealth, with what safety assassins may attempt its awful head.

Here was a severe attack upon the jury's action in Hardy's case and a defense of the state against assault—ideal for a political judge sitting in a political trial during a Civil War. Cadwalader's only comment is a marginal note, "This unjust diatribe shows the violence of party prejudice at this period".[35] To this reviewer this is a sounder comment, and expresses a better value-system, than all the economically oriented, sociologically based, politically knowledgable comments of Dr. Kirchheimer.

In fact, it is in the utility of Dr. Kirchheimer's *schema* that his absence of a definition for Justice is most fatal. One might excuse such execrable shorthand as

> Justice Frankfurter's solicitude for the survival of embattled authority in mass society, and Justice Harlan's pronounced upper middle-class sentiment of the limited debt which society owes to the various classes of its citizens [and] Justice Clark's appear[ing] as a stand-in for J. Edgar Hoover's "big brother" image of state power, while Justice Douglas' conscious role is auxiliary dynamo for the attainment of a better society.[36]

This is merely the sort of ludicrous play so-called liberal constitutional law professors in political science departments regularly engage in—and no man should be condemned for his professional blinders. One might even excuse such a weirdity as "recall[ing] cruel miscarriages of justice that had victimized men like Titus Oates and Alfred Dreyfus".[37] One can certainly pass over Joseph Calliaux "sneering" at his enemies with monomanic regularity[38] or tipping a Pullman porter on an Italian train.[39] The last statement one can enjoy, at least, as his mind's ear hears that porter's reply: "Grazia, boss, massa signore, ya'll!" One can bear with neolog-

33. 24 State Tr. 209-232 (1794), notes, reprints a severe attack on Eyre's charge to the grand jury (which, without being in response to Erskine's statement, still sets out the same argument addressed to the petit jury) and attributes authorship to Felix Vaughn. A radical like Godwin would have been far less acceptable.

34. 1 BURKE WORKS 3 is said to be the source.

35. 24 State Tr. 199-202 (1794), margins, of Judge Cadwallader's copy in the Temple University Trials Collection.

36. KIRCHHEIMER, *op. cit. supra* note 4, at 428.

37. *Id.* at 60.

38. *Id.* at 37, 68.

39. *Id.* at 70.

lems,[40] and even an obscure and illogical style that ought to have been improved by a stern editorial hand and for which the publishers must share ultimate responsibility.[41] But there are more important matters wherein forgiveness or oversight come hard.

In discussing the Ebert libel trial, Dr. Kirchheimer criticizes the Social Democrats for claiming to have taken the position of patriots in World War I, on the grounds that "this approach was either meaningless or else a mark of distinction".[42] It is impossible to know what this means. True, everything is important *or* unimportant *and*, sometimes, simultaneously so, *but* only from some special viewpoint. Without the viewpoint it is such a remark which is meaningless. Friedrich Ebert had rejected a role as revolutionary savior of the Fatherland in the style of the Gracchi. He had preferred the part of savior of the old order in the manner of McKinley versus Bryan, so that he could appeal to as wide a spectrum of voters as possible—and his act was "meaningless" or "distinctive" to different groups to whom his appeal was addressed. But this was the hard—and probably wrong—choice of a mediocre politician and not the base for any general theory of Political Justice. In the Otto John trial, Dr. Kirchheimer is even more off the point.[43] If J. Edgar Hoover defected to Moscow or Peking, denounced the United States, gave his hosts information both good and bad, and then redefected to the United States, can *any* law-trained person say he could *not* be tried for treason or that a penalty of four years servitude would be unduly *harsh*? If he were not indicted or sentenced, that would be a policy matter inhering in the problem of what brings persons before court process; but it would not be his trial that would be unjust.

Furthermore Dr. Kirchheimer's building a theory of the *Hiss* case, on the fact that the prosecution made no effort to show the unimportance of the documents taken, is disingenuous.[44] Perhaps other persons intended to use the trial as a means of establishing "the intellectual as traitor", but it appears to this reviewer to impart motives to the prosecutor which he never had. As Dr. Kirchheimer points out, Hiss himself had made the documents' inherent importance an irrelevancy by the nature of his defense. What possible motive in trial advocacy would the prosecution have had to emphasize them? None in this reviewer's opinion. And American lawyers in the courtroom *are* basically advocates who will compel their clients to cooperate on a non-political level or give up the case, for there is no sympathy at the American bar for tactics similar to those of Paul Levi, the counsel for Rosa Luxemburg.[45] Disbarment for the lawyer so behaving would come surely and unsympathetically. This is not to say that the American bar is unpolitical. Indeed Walter Murphy has said it is "commonplace" to regard the consequences of legal actions as political, though such a view in the United States has certainly only been a commonplace in the last generation.[46] But the American legal position has stressed the elimination of partisan roles on the part of either prosecution, bench, defense counsel, police and expert witnesses, or the court's side officers. Whether "enlightened" or not, it is the American lawyer's prejudice; and it is unwise to overlook it when constructing a theory.

But whatever the criticism, the reader comes back again and again to the void that floats at the center of the book. How does one judge the Justice of Thiers' political act in shooting and exiling thousands of Communards? Dr. Kirchheimer seems puzzled that Thiers should have done it without meaning to destroy French democracy.[47] But it did damp the ardor in the tendency to rush to the barricade which had bedeviled French political life in the preceding eight decades. And how does Justice judge the Nazis' forgiving of businessmen's tax frauds against the Weimar Republic in order to attach them to the Third Reich?[48] Dr. Kirchheimer says that "politics is a volatile subject. There are fundamental minimum requirements of human decency which are valid for all regimes and all proposed solutions and cannot be waived either in advance or retrospectively; but changes in political requirements and perspectives are nonetheless in the nature of things."[49] Here is one more arid, peripheral reference to what should be the throbbing heart of his argument—the values of Justice. Or is Justice to be entirely intuitive and only Politics describable? Surely Justice goes beyond the courtroom; or Dr. Kirchheimer is right and Justice is "interstitial" and merely the "gap" between what the executive commands and the court orders or decrees.

Rarely has an author offered so little in the name of Justice as Dr. Kirchheimer. After a book devoted, at least in part, to an explication of the evils of Political Justice, his penultimate paragraphs contain a paean *to it*, because Political Justice is superior to being executed out of hand, because it permits the condemned to have the pleasure of protesting before being hung, because "it used to produce new images rather than confirm previous political or military results, it is one of the more civilized of

40. *Id.* at 257, "Jurisdical" being one example. One also overlooks the use of such antique synonyms of commoner terms, as "vilipend", *id.* at 360.

41. For example, *id.* at 131, second paragraph, wherein the impersonal pronoun is improperly used as referrant; *id.* at 192, second paragraph; *id.* at 196-197n, wherein some words must have been omitted; *id.* at 255, lines 9-11, which are incomprehensible as to what sort of discipline trial lawyers should be under; *id.* at 319, line 23, as to the sense in which "opposed" is used; *id.* at 401, lines 6-8, being needlessly elliptical; *id.* at 403, last paragraph as to the difference between the two points "differentiated"; and *id.* at 419, wherein logically "necessary", "choice", "convenience" are just not of the same genera for comparison.

42. *Id.* at 82.

43. *Id.* at 91-92. John had been president of the Office for the Defense of the Constitution, called by the popular tabloids, "The West German FBI."

44. *Id.* at 113-114.

45. *Id.* at 246n, 250n, makes the point. On Paul Levi, see 247n. It has even been true on many occasions of American prosecutors that the state's case has been depoliticalized.

46. Compare, FRANK, LAW AND THE MODERN MIND 32 *et seq.* (1930) with MURPHY, CONGRESS AND THE COURT (1962) vii.

47. KIRCHHEIMER, *op. cit. supra* note 4, at 407.

48. *Id.* at 409n.

49. *Id.* at 429.

politics" games." Political Justice emboldens the "image-creating capacity" of the masses and gives them a more intimate sense of participation than any mere parliamentary proceedings would. Political Justice is beneficial because "its illusions are sufficiently hidden from the onlooker not to disturb his sense of drama and aesthetic enjoyment." [50] The same benefits could be found in a lynching (when we sociologically understand it), in the consumption of the Italian airmen by the Gizenga forces in Kivu (when we anthropologically understand it), in boycott or blockade to starvation and death (when we economically understand these acts), in the *auto da fe* (when we psychologically understand it), and in Castro's liquidation of the bourgeoisie (when we politically understand it). The only idea that does not seem to get any understanding in all of this is the concept of Justice.

In his conclusion Dr. Kirchheimer says that "what is beneficial is invariably grotesque and monstrous, too," and that Justice "is a necessary delusion in an antagonistically organized society". At this point his argument is pure Saint Genet from *The Balcony*, wherein Platonist ideals are tossed in a non-resolvable Hegelian dialectic and no man has existence apart from his role and function. Having taken the reader to this comedy, after some 430 pages, Dr. Kirchheimer departs, saying only Clio can judge, as this Muse (her heroic trumpet presumably silent and the water roaring through her clepsydra) reveals with one hand the records of the past and destroys with the other the records of present deeds. And in departing, Dr. Kirchheimer, who has been at such pains to be scientific, who has bent over backwards relatively speaking and eschewed the absolute except through elliptical references in the style of an Existential divine, this twentieth century scholar can leave us with no more for final word than a postscript the thirteenth century Thomas di Celano tacked onto one of his own poems:

> Constantly tears will flow
> When the guilty rise from the ashes to the judgment throne.
> God, we beg, be kind to them. [51]

Dr. Kirchheimer prescribes Brecht and Celano to be taken in consecutive doses—Brecht for the living; Celano for the dead. Certainly this reader sheds tears at such an offering; and he prays that God will be kinder to Dr. Kirchheimer than this reader has been in his thoughts. It's a poor show to think we can't do better than the Sumerians did in 2050 B.C.—and cause for asking divine intervention.

Earl Finbar Murphy †

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50. *Id.* at 429-430.

51. *Id.* at 430-431. The Greeks had thought of law without justice when Antiphon pitted the "natural" law of self-preservation and self-indulgence against the "unnatural" human laws opposing these, Cornford, Before and After Socrates 41-42 (1932). Shall we count Dr. Kirchheimer as one of the Sophists? It would be no worse position than standing with Brecht and Genet on this issue.

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Political Justice. By Otto Kirchheimer. (Princeton, New Jersey: Princeton University Press, 1961. Pp. vii, 452. $8.50)

The use of legal procedure for political ends is most frequently associated with strongly authoritarian or totalitarian systems of government. This book is an important contribution to the study of courts in the political process, because it examines the role of the judiciary to gain certain political ends under constitutional systems. Professor Kirchheimer's systematic analysis of trials for various political purposes under constitutional and totalitarian systems stresses the problems which each system encounters in achieving the aims of the trial, the various forms of trials, the "dramatis

personae" participating in the political play brought into the courtroom, and pursues also the nature of clemency and asylum.

Assuming that "every political regime has its foes or in due time creates them," the author points out that the ensuing power struggles between the regime and its foes and among competitors for political power will take a variety of forms. The courts, which through show trials, legalization of purges and staged public confessions of political opponents of a system, have served as terror and propaganda instruments of totalitarian systems, do have an important, albeit somewhat different, extra-legal function also in constitutional systems.

As constitutional governments in modern times grew in scope and their political power came to rest on the broader bases of unlimited suffrage and extensive public opinion, conflicts arose within democracies which engulfed the judiciary along with the traditionally "political" parts of government. The author summarizes the most urgent occasions for court action in connection with repressive programs in contemporary non-totalitarian society in four categories: (a) formal restriction of freedom which becomes necessary for successful police and security operations; (b) control measures which have passed the dividing line between informal restraints and actual coercion and result in the victim's demand for formal adjudication; (c) the government in question has decided on either total repression of its foes or on wearing them down by continuous judicial proceedings against them which limit their political availability; (d) carefully chosen segments of deviant political activity are submitted to court scrutiny, not so much for repressive effects as for dramatizing the struggle with the enemy and gaining public support.

The problems which beset a constitutional system if it wants to take either one or all of the above steps involving the judiciary are complex, and Professor Kirchheimer points up these complexities by a thorough analysis of the Smith Act trials in the United States and the procedures involved in outlawing the Communist Party in the Federal Republic of Germany. He shows the greater dilemma confronting the United States judiciary, because constitutions of the "older liberal type" make the substantive determination of the sphere of permissible revolutionary action and propaganda quite problematic. Under the American Constitution the Supreme Court was forced to make specific acts on the part of the accused the basis of judgment. According to the rule of law it is not enough

to know that the group in question prepares a state of psychological readiness for future political action, and demand total repression. The position, however, calls for a constant alertness, frequent shifting of positions and relocation of battle lines between the governmental organization (and its instrument—the judiciary) and the hostile group.

The Bonn Basic Law, on the other hand, an example of a more recent constitution, drawn up as reaction against totalitarianism, clearly makes repression of antidemocratic political movements part of the rule of law. This enables the judiciary to consider a suspected group's perennial readiness to take action which will ultimately result in the destruction of the constitutional system as a sound basis for legal and complete repression.

It is this conflict between legal repression of political organization and constitutional systems based upon competing political parties and the writer's penetrating analysis of a troubling subject matter which make the book an important source for any scholar interested in political justice. The section on political trials under totalitarian systems pointing out difficulties even for those regimes to explain judicial involvement in political matters, and the massive documentation with sources usually not gathered within one volume, add to the significance of this book. The only question of "political justice" which to this reviewer could have been pursued in greater detail is that of impeachment. However, the scope of the book is so broad that not all aspects should possibly be treated in equal depth.

ELKE FRANK

Florida State University

Political Justice. The use of Legal Procedure for Political Ends. By OTTO KIRCHEIMER. [Princeton University Press. London: Oxford University Press. 1961. xiv and 431 and (Appendices and Index) 20 pp. £3 8s.]

THIS long, detailed and interesting work analyses, both from an historical point of view and as a contemporary problem, the function of the legal system, and in particular the judicial process, in the maintenance of political power. It discusses the dilemma which faces the judge in the "political trial" (which is carefully distinguished from the ordinary criminal trial) not only in past and present totalitarian countries but also under democratic régimes.

An enormous amount of information is incidentally given on political trials, some famous, some forgotten, in many countries. Nevertheless, the concluding summing up is rather nebulous and disappointing; perhaps the present reviewer has simply failed to penetrate its formidable barrier of sociological terms.

Ex-Communist Witnesses. Four Studies in Fact-Finding. By HERBERT L. PACKER. [Stanford University Press. London: Oxford University Press. 1962. 247 and (Appendices and Index) 32 pp. £2.]

THIS is a careful investigation by a Professor of Law of Stanford University into the evidence given by four ex-Communists (of which the most famous is Whittaker Chambers) in three types of fact-finding inquiries concerning Communist activities in the United States. Court trials, administrative hearings and Congressional investigations are compared with one another and with British Tribunals of Enquiry, Royal Commissions and Departmental Committees. The conclusion is one of doubt regarding present American methods of fact-finding in political and semi-political matters and a reasoned plea for a new instrument of investigation.

Die Justiz als politische Waffe

copy to author

"Political Justice—The Use of Legal Procedure for Political Ends" by Otto Kirchheimer
Princeton University Press, 1961, $8.50

Otto Kirchheimer, in Heilbronn geboren, Dr. jur. der Universität Bonn, Professor an der New School for Social Research in New York, und letzthin Fulbright Professor in Feiburg i. Br. hat mit seinem Werk über die politische Justiz einen hervorragenden Beitrag zur Wissenschaft des Rechts und der Politik geleistet. Auf 452 Seiten analysiert er den Gebrauch und Missbrauch, den politische Machthaber oder Funktionäre der Justiz selbst mit der Rechtssprechung seit Jahrhunderten getrieben haben. Mit umfassenden Quellenkenntnissen ausgerüstet, behandelte er die Justiz der anglosächsischen Länder mit der gleichen Intensität wie die des europäischen Kontinents z. B. der französischen Revolution, der Monarchien, der Weimarer Republik, der Bundesrepublik, des Ostblocks, der Alliierten nach dem II. Weltkrieg, und schliesslich den politischen Justizfall Eichmann.

"Acht Jahre Politische Justiz" hiess eine Denkschrift der deutschen Liga für Menschenrechte, an der E. J. Gumbel, K. Grossmann und ich vor 34 Jahren gearbeitet hatten. Jetzt hat Kirchheimer auch dieses Thema wissenschaftlich behandelt und gezeigt, wie die Unterminierung einer Demokratie auch durch antidemokratsiche Justiz-Kräfte erfolgen kann, die politische Mörder laufen lassen und Anhänger der Demokratie durch "Urteile" diffamieren.

Kirchheimers wissenschaftliche Analyse der nationalsozialistischen Einwände gegen die Nürnberger Prozesse ist besonders zeitgemäss. Wie notwendig seine Klarstellungen sind, zeigt eine erst kürzlich stattgefundene grosse Diskussion über die Bewältigung politischer Schuld in Strafprozessen vor der Katholischen Akademie in München. Mit Recht hat Paul Wilhelm Wenger im "Rheinischen Merkur" auf die bittere Tatsache hingewiesen, dass bei dieser Diskussion einige Juristen den Versuch machten, die strafprozessuale Bewältigung von Massenverbrechen als juristische Missgriffe abzuwerten.

Das Buch Kirchheimers sollte daher auch an deutschen Universitäten und Gerichten weite Verbreitung finden.

"The Price of Liberty" by Alan Barth
The Viking Press, New York 1961, $4.50

Alan Barth, Leitartikler an der Washington Post und politischer Wissenschaftler, setzt in einer glänzend geschriebenen wissenschaftlichen Studie auseinander, wie unsere Grundrechte durch gewisse Massnahmen von Justiz- und Polizeibehörden ständig bedroht werden. Er beschäftigt sich mit unrechtmässigen Verhaftungen, Missbrauch von Geständnissen, Verletzung der Privatatmosphäre durch Abhörvorrichtungen und ähnlichen ungesetzlichen Akten.

Das gesamte Problem der Grenzziehung zwischen den Rechten des Bürgers und denen des Staates zum Schutz der Allgemeinheit wird in diesem ausgezeichneten Buch auf 212 Seiten an praktischen Beispielen behandelt, die aus der grossen Journalistenerfahrung des Verfassers stammen.

Robert M. W. Kempner

Die Wiedergutmachung Feb. 2 '62

KIRCHHEIMER, OTTO. Political justice; the use of legal procedure for political ends. 452p $8.50 Princeton univ. press

320.1 Political science. Law 61-7418

An "analysis of the operation of the judicial process when used for political purposes—the ends it serves, the circumstances under which it is invoked, the manner in which it reflects and responds to political pressures. . . . [The author, a Professor of Political Science at Columbia University] considers political justice in many different periods of history, under a great variety of regimes, as illustrated by numerous cases." (Pol Sci Q) Bibliographical footnotes. Index.

"Considering the scope of this work, it is very much to Kirchheimer's credit that he kept control of almost all the many threads from which he wove this narrative. He lets the reins slip only rarely, and perhaps because the author is more at home in European sources than in matters concerned with the United States. . . . His ommissions suggest the need for a companion volume rather than an imbalance in the present one. I find more to criticize in the topical organization that the author employed. It led to piecemeal reporting and analysis and to repetitive summaries. . . . This is, nevertheless, a learned, successful, and significant work . . . destined for extensive use by workers in constitutional history and by all students of history and government." H. M. Hyman

+ — Am Hist R 67:679 Ap '62 650w

"Although Professor Kirchheimer appears generally to assume the positivist definition of law and remains faithful to his descriptive approach, delineating the material in terms of the assumptions, motives, techniques, and actions of practitioners of power, he now and then expresses judgments in 'ideal' terms. . . . However, such seeming contradictions do not significantly detract from this real contribution to jurisprudence. . . . The extensive footnotes not only enrich the book but indicate the wealth of materials used, many not available in English." J. P. Duncan

+ — Am Pol Sci R 56:438 Je '62 950w

Reviewed by J. H. Skolnick

+ — Am Soc R 27:723 O '62 500w

+ Ethics 72:226 Ap '62 60w

+ Foreign Affairs 40:496 Ap '62 30w

Reviewed by J. L. Andrews

+ Library J 87:987 Mr 1 '62 180w

"Tales of state trials are naturally dramatic, and no one could have paraded them with greater erudition or industry than Otto Kirchheimer. . . . Whenever he recounts a particular case . . . he never fails to absorb the reader. Profiting from a European educational background, he not only includes several prosecutions that are unfamiliar to Americans, he also portrays familiar prosecutions in an unfamiliar perspective." Edmond Cahn

+ N Y Times Bk R p12 Ja 14 '62 850w

"There are perceptive discussions of the use of informers; the significance of insisting upon naming collaborators in political trials; the function of the security police; the treatment of defectors—including American insistence upon repentance; and public attitudes toward political deviants. Very little is available today that illuminates more sharply the problems of a modern democratic society seeking order, liberty and change under a rule of law. . . . Unfortunately, the style is obscure at times . . . but as one proceeds it gains in clarity and eloquence." T. I. Emerson

+ — Pol Sci Q 77:267 Je '62 800w

stitute of International Relations in Moscow. Kaznacheev's descriptoins of the latter are among the most interesting parts of his story.

Graduating from the IRI in 1957, Kaznacheev was sent as a "probationer" to the Soviet Embassy in Rangoon. Within a year or so, he was co-opted into "the most elite of all Soviet Intelligence units operating in Burma," the Political Intelligence group. The bulk of the book consists of detailed descriptions of the organization and functions of the various Soviet agencies in Burma, both inside and outside the embassy. Interwoven with this material are anecdotal accounts of personalities and relationships within the official Soviet family. Brief factual statements and Kaznacheev's analyses of Sino-Soviet relations are also included.

It is impossible for an outsider to establish the reliability in detail of an "insider's" story. *Inside a Soviet Embassy* is fictionalized at least to the extent of purporting to present verbatim reports of conversations and statements. But this is a standard technique which may owe as much to Mr. Simon Wolin who edited the book as to Mr. Kaznacheev. The general descriptions of the intelligence functions of Soviet diplomatic and other missions and of the internecine distrust within such missions are in accord with evidence on these points from other sources.

WARREN B. WALSH
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KIRCHHEIMER, OTTO. *Political Justice. The Use of Legal Procedure for Political Ends.* Princeton, N.J., Princeton University Press, 1961. 452 pp. $8.50.

The author of this book, Professor of Political Science at Columbia University, has dedicated his work "To the past, present and future victims of political justice." This dedication reflects the author's sceptical attitude toward what is called "political justice."

The reader will not be surprised therefore, when the author characterizes political justice as a disguised repression or revenge on the part of the regime in power. He cites numerous examples from the practices of very distant periods of human history as well as of modern times, notably the Fascists, the Nazis, and the Communists.

"Every political regime has its foes or in due time creates them," writes Kirchheimer, and it seems inevitable that foes initiate the fight against a regime while the latter tries to exterminate or terrify them. A political trial is one of the possible and most suitable means of such a fight. Kirchheimer characterizes three categories of political trials: "The trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution; the classic political trial: a regime's attempt to incriminate its foes' public behavior with a view to evicting them from the political scene; and the derivative political trial, where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe" (p. 46). The worst kind of a political trial is "a spectacle with prearranged results." Such are the trials under the modern totalitarian regimes.

Kirchheimer does not limit his work, however, to the exposition of the negative sides of political prosecution in the disguised form of legal trials. He emphasizes also the significance of genuine justice. To a regime for which "a free competition of ideas and social forces is anathema" he opposes the rule of law when the opposition is protected by law and is not prosecuted for merely disagreeing with the existing government.

Kirchheimer's book will be of great usefulness for politicians, judges, law-makers, and teachers of law.

GEORGE C. GUINS
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LANDSBERGIS, ALGIRDAS and MILLS, CLARK. (Eds.). *The Green Oak.* New York, Voyages Press, 1962. 117 pp. $5.00.

Poems in translation are often lusterless—disappointing to those who do not know the originals, painful to those who do. *The Green Oak*, a collection of Lithuanian poetry ancient to contemporary, is remarkable for the number of entries that retain their sparkle and impact despite the difficulties of their rebirth in English. Their fidelity to the Lithuanian texts cannot be judged by this reviewer, but as an enjoyable experience for the English reader they are a bright success and do credit to editors Mills and Landsbergis as well as to the nearly two dozen translators who contributed to the volume.

Digging down to the roots of Lithuanian poetry, *The Green Oak* begins with forty-two *dainos*, brief folk lyrics that are centuries old. The seventy-two poems that follow represent individual writers from Donelaitis (eighteenth-century to present-day poets in exile, plus a few offerings from contemporary Soviet Lithuania.

Apparent throughout but most striking in the dainos is a kind of timeless simplicity of style and content. Singing on such themes as family affections, the love of lovers, devotion to homeland, the splendors of nature, this poetry seems to overflow with simple goodness. The picture it creates of Lithuania and its people is very appealing. Perhaps it is too idyllic. Still, anyone who has ever strained through the murky depths of some of our modern poetry for shreds of music or meaning will find a dip in the clear waters of this different cultural stream highly refreshing. And possibly illuminating: We are a wealthy and powerful country, the Lithuanians currently have no country at all; but we have the singing commercial, they have the *dainos*.

ANITA NORMAN
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LEONHARD, WOLFGANG. *The Kremlin Since Stalin.* Trans. by Elizabeth Wiskemann and Marian Jackson. New York, Praeger, 1962. 403 pp. $7.75.

This book is a detailed chronology of the documented facts about changes in Soviet leadership from 1952 to the present. The author tries to go behind the scenes and report the intrigues of the top

responsible for the emergence of conflict subcultures. Cavan is also prone to make statements that are open to considerable doubt, such as "most juvenile offenders either smoke marihuana or use heroin." Despite its limitations, the book, if judiciously interpreted, will serve as an effective teaching device.

PETER G. GARABEDIAN
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Changing Patterns of Military Politics. Edited by SAMUEL P. HUNTINGTON. Preface by HEINZ EULAU. International Yearbook of Political Behavior Research, Vol. 3. New York: Free Press of Glencoe, 1962. 272 pp. $7.50.

In the current era of international political power relations, the military establishment has assumed a top-level institutional posture while the military profession, by force of circumstances, is increasingly assuming political roles. Samuel P. Huntington, the editor of the present volume, is probably best known for his authorship of the 1957 book, *The Soldier and the State: The Theory and Politics of Civil-Military Relations.*

Huntington does not offer the present book as a sequel to this earlier volume. It is, rather, a collection of essays with an introduction and concluding overview by Huntington. In the introduction, Huntington discusses "The New Military Politics," followed by his essay, "Patterns of Violence in World Politics." Then follow the interesting essays by well-known authors: Harold D. Lasswell, "The Garrison State Hypothesis Today"; David C. Rapoport, "A Comparative Theory of Military and Political Types"; Laurence I. Radway, "Military Behavior in International Organization: NATO'S Defense College"; Raoul Giradet, "Civil and Military Power in the Fourth Republic"; Philip Abrams, "Democracy, Technology, and the Retired British Officer"; and Martha Derthick, "Militia Lobby in the Missile Age: The Politics of the National Guard." In his introduction, Huntington calls this collection of essays a symposium of papers which have neither common subject nor common method. He does, however, suggest that they will serve a common purpose in opening the door to fruitful research in what he calls "the new military politics of the 1960's."

To this reviewer the most interesting of the essays were those by Lasswell and by Derthick. These two essays are particularly current and deal with facets of the American political power structure under constant discussion in the mass media of communication. The preface to the volume, by Heinz Eulau, is also well worth the reader's attention.

Huntington has done an excellent editorial job despite the fact that the essays are almost totally unrelated to each other in frame of reference and content. Here is a volume that should certainly attract the attention, not only of social and political scientists, but also of other individuals more directly concerned with national political and foreign policy making.

CHARLES H. COATES
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Political Justice: The Use of Legal Procedure for Political Ends. By OTTO KIRCHHEIMER. Princeton, N.J.: Princeton University Press, 1961, ix, 452 pp., $8.50.

Students of the sociology of law will welcome this volume. A central question in this field, as put forth by Weber, is the manner in which authority is made legitimate. *Political Justice* grows out of Tocqueville's shrewd observation that "It is a strange thing what authority the opinion of mankind generally grants to the intervention of courts. It clings even to the mere appearance of justice long after the substance has evaporated; it lends bodily form to the shadow of the law." Hence, the subject matter of this book is the manipulation of the symbols of justice to achieve the ends of political goals.

In scholarly and learned fashion, Kirchheimer details a number of political trials as well as broader policies for utilizing legal machinery to put down dissident and opposing groups. He also examines the pressures structured into the legal system that fall upon judge, prosecutor, defendant, and lawyer in the political trial, and the limits of choice and opportunity open to these *dramatis personae.* All in all, it is a commendable book.

I have two reservations—one procedural and one substantive.

The book is not as systematic as it ought to have been. There is an interesting conceptual framework in the first chapter (based largely upon the ideas of Weber who, incidentally, is not cited), but the materials which follow rarely refer back to it explicitly. Consequently, one sometimes finds oneself lost in a maze of detail without being able to discern a conceptual referent.

The substantive criticism is as follows: Although the author sets out, as one of his categories of political trial, the "derivative . . . where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe," he fails to cite

Riesman's brilliant article (42 *Columbia Law Review* 1085) on the use of libel and libel law as a major political weapon. Thus, the Nazis turned the law of defamation on its head by publicly calling their Gentile enemies Jews. These opponents were then faced with an impossible dilemma: Either they sued for defamation, in which case they would be forced publicly to claim that "Jew" was a term of opprobrium; or if they did not sue, their religious identity might be in doubt, an unhappy situation in the Germany of the Thirties.

Whatever criticisms the book may merit, it breaks some new ground in a significant area, namely, the symbolic import of the semblance of a rule of law, even, and indeed especially, when substantive goals are being interfered with by formal procedure.

JEROME H. SKOLNICK
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BOOK NOTES

Cities and Churches: Readings on the Urban Church. Edited by ROBERT LEE. Foreword by JOHN C. BENNETT. Philadelphia, Pa.: Westminster Press, 1962. 366 pp. $3.50.

For over a generation Protestant churchmen have been studying the impact of urbanization on their historically rural and small-town religious tradition. The present volume is a collection of essays dealing with the problems that urbanism has posed for the churches and the ways in which these problems have been or might be met. Aside from three classic readings on the sociology of the city by Wirth, Simmel, and Park and a few empirical reports by contemporary sociologists, all the selections are by churchmen writing from a specifically religious perspective. Most of these selections manifest a concern with developing an effective Christian witness and sense of community within the urban environment, and especially within the "inner-city" areas where old-line Protestantism has never been very successful. This is a well-selected group of essays that is likely to appeal more to Protestant clergy and seminarians than to academic sociologists.

BENTON JOHNSON
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The Sociology of Education: A Sourcebook. Edited by ROBERT R. BELL. Dorsey Series in Anthropology and Sociology. Homewood, Ill.: Dorsey Press, 1962. viii, 368 pp. $6.50.

This is a compilation of twenty-six papers organized in five parts. The editor provides an organizing framework for each part in an introductory statement. The five titles give some indication of the content: *Social Change and Education; Non-formal Learning Situations; Social Class; The School as a Social System;* and *The Teacher.* All but a few of the articles are by sociologists and all contribute to a sociological analysis of the educational institutions.

The editor chose to include a relatively small number of complete selections rather than portions of a larger number. This limits the range of selections and may reduce its usefulness to some potential users. Sociologists who have followed the sociology of education literature will be acquainted with nearly all the selections. Others who are looking for a sourcebook in the field will find significant sociology of education material in this volume. The editor made no attempt to provide either a complete survey of the field or selections bearing on all phases of the literature. Rather, the choice of articles is based on his "own reading knowledge and experience in teaching a course in the sociology of education."

Some may use this volume as a text, but the limited scope and inadequate coverage of many areas would necessitate extensive supplementation. It will be useful as a supplement to texts in the field, but some will not find significant contributions they would have selected.

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Readings in Sociology: Sources and Comment. Edited by JOHN F. CUBER and PEGGY B. HARROFF. New York: Appelton-Century-Crofts, 1962. xiii, 337 pp. $1.95, paper.

The reason given by the authors for adding this book of readings to the growing list of such publications is the need for a "book of readings which would supplement any of the currently used textbooks and still hold total cost to a reasonable level." These goals are met reasonably well. The book, in addition to being relatively inexpensive and conveniently compact, does contain a large number of readings, forty-eight in all. The selections, themselves, vary widely in content; there is something for everyone. What emphasis is found in these selections would be on the kind of insights and challenging ideas which might appeal mainly to those who, along with Robert

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Political Justice: The Use of Legal Procedures for Political Ends. By Otto Kirchheimer. Princeton, N.J.: Princeton University Press, 1961. Pp. xiv, 452. $8.50.

The idea of a book on political justice excites the mind to questions and perplexities. Perhaps chief among them is whether the discipline of law can tame the unruliness and opportunism of the political game. Or must politics inevitably gain the upper hand and subject the law to unseemly indignities by impressing age-old doctrines and procedures into new and unfamiliar service?

"Political justice" is not used in this book in the sense of an ideal order of government in which all citizens communicate with the body politic to assure its highest perfection. Rather it is used to define that segment of law in which the devices of justice are used to bolster or create new power positions against real or imagined enemies of the state. The author explains that the book is neither a history of political justice nor a collection of its most noteworthy cases, thus explaining the absence from its pages of such a cause célèbre as the Dreyfus case. The book is designed to expose the underlying mechanisms of political trials by relating their political content to the juridical form in which cases take place.

Professor Kirchheimer, a native of Germany and now a professor of government at Columbia University, has lavished comprehensive and painstaking research on his subject in the tradition of good European scholarship. He has capitalized on most of the opportunities presented by the vast field he surveys. Although the book is flawed by meandering and by a heaviness of language, it strikes this reviewer as a highly valuable contribution.

The ambitiousness of the project is easily appreciated by its range of problems: When will a regime find it necessary, possible, or convenient to resort to the judicial process for political ends? How do the actors in political trials — judge, jury, prosecution and defense counsel — respond to their new roles as they are willy-nilly thrust in the spotlight of conflict for political advantage and power? What part is played by the supporting cast of informers, collaborators, defectors, and security police? To what degree can political justice enable a regime to "legitimize" its status, marshal public opinion to its ideology and objectives, and dispose of its enemies? How do clemency and asylum mitigate the consequences of political justice? Finally, in what circumstances, if any, can resort to the courts to validate political goals be justified in normative terms?

A basic question is whether political trials can be distinguished from the usual run of judicial business. Do not all questions of tort and contract, not to mention constitutional law and labor law, ultimately involve adjustments between competing social and economic forces, and are not such adjustments what politics is all about? Kirchheimer handles this question skillfully. Recognizing that most trials may harbor long-range socioeconomic effects, he nevertheless argues persuasively that there is a critical difference between the usual courtroom conflict and those cases in which the judiciary is called upon to exert immediate influence on the distribution of political power. In such cases, the trial serves to advance or harm the interests of a definable political group. To elucidate the distinction, he points to the differences between a perjury trial growing out of alimony proceedings and one turning on statements made before the House Committee on Un-American Activities; between a homicide trial of a doctor's wife in Cleveland and a trial for the murder, after a hotly contested campaign, of a candidate for Governor of Kentucky; and between a trial for conspiracy to rob a bank and a trial for conspiracy to advocate the overthrow of government by force and violence.

The most solemn and far-reaching political cases — indeed, cases which throughout history have tested and tormented established governments — arise when a regime turns to the courts for assistance in repressing hostile political organizations. The author introduces this theme by lengthy comparative treatment of the varying conclusions reached by the Western countries as how best to proceed against domestic Communist movements after World War II. While Germany and the United States in different ways employed the courts to combat the Communist Party, France and Italy resisted this temptation but discriminated against the Party in the administration of election laws and within the parliamentary system. Great Britain and the Scandinavian countries resorted to neither of these forms of repression, but consistently adhered to a "policy of equal treatment" for all political groups.

Kirchheimer valiantly attempts to derive the causes for these disparities of policy. As one might expect, they are complex. A nation's cultural traditions and transitory leadership both play a part. But hard political facts more often lie at the root, including the strength of the Party within each Western country and the likely reaction of the mass of people to different policies. Open repression must risk, apart from the uncertainties of trial, the revulsion of former friends from a pattern of persecution, the martyrdom of victims, and the consequences of driving opposition underground. Displaying erudition and a shrewd political sense, Kirchheimer provides telling insights into the manipulation of means to cope with domestic movements believed a threat to stability. It is not to detract from these insights that this reviewer suggests that neither history nor what we have been able to learn of the nature of man supports

the author's conclusion that "legal repression of democratic mass movements is bound to be futile in the long run." (p. 171) Throughout recorded history, exactly such repression has taken place, and the hegemony of "democratic mass movements" still remains mostly a dream. In addition, it must be said that not everyone is interested in the long run, and this perhaps explains the undiminished ardor with which such repression is widely attempted.

Since finally the trial's the thing, it is to it that we turn with special interest. In such high drama no participant is immune from the severe psychological strain of resolving the inconsistent pulls of duty, fairness, and self-interest. Whether the trial is in France, Germany, the United States, or elsewhere, there is a judge torn between the duty of impartiality and the pressures to vindicate fundamental political goals of a regime from whose establishment he is recruited; a prosecutor weighing political as well as legal risks every step of the way, from the initial, tough decision whether to prosecute at all to the recommendation of appropriate punishment after conviction; and a jury, historically a buffer between the state and the accused, but here acting under manifold compulsions to sustain the state. The agents of the state are not alone in finding themselves in awkward roles. At every turn the defendant will ponder his legal and political objectives; that they are often in reciprocal relation will mean that one or the other must be sacrificed. Defense counsel, too, must face some hard facts. If he is part of the apparatus of the prosecuted political party, the political goal of preserving the public image of his cause may create legal risks to both client and lawyer;[1] on the other hand, if he does not share the politics of his client, he frequently will endure the irony of public obloquy for services rendered to a national enemy, while in fact he may be responding to subterranean needs to vindicate the regime.

After all concerned play out their roles, it is the judiciary who must make an ultimate determination concerning the legality of a political group or of governmental action designed to curb it and its membership. This decision ordinarily involves an estimate of the purposes and strength of the group matched against the power and determination of the existing government. The decision thus becomes, in the words of the late Justice Jackson, "a prophecy . . . in the guise of a legal decision."[2]

The degree to which the judge has authentic intellectual independence in reaching a decision will vary, of course, with political conditions. All executives move to destroy what Kirchheimer calls "judicial space" — the uncertainty of result in political trials. Such uncertainty was completely wiped out in the show-trials of Hitler's Germany and Stalin's Soviet Union, where the judge acted purely as the political agent of the regime. But even in democratic countries the judge acts within a narrow compass when the enemy of the state sits in the dock and the engines producing national conformity are open full throttle.

That "judicial space" is compressed in the United States will be apparent to anyone who inspects the opinions of the Supreme Court sustaining, for example, the convictions of Eugene Debs and Benjamin Gitlow after World War I[3] and of Eugene Dennis and Junius Scales a generation later.[4] That some "judicial space" remains, however, perhaps more than commonly recognized, is apparent from decisions limiting the inquisitorial license of legislative committees[5] and other decisions cutting back the executive's power to utilize political grounds to deport aliens,[6] restrict travel,[7] and strip individuals of citizenship.[8]

Ward politicians and political science purists alike may balk at the concept of "judicial space." Politicians because they know that everyone must "go along," even if he is a judge ("How else did he get the job?"). Purists because they may regard a catchy tag line for a familiar theory of the nature of freedom as superfluous and confusing. Vincent Starzinger suggests this point in an excellent analysis of the book under review:

> . . . American society does trust its judiciary with the adjudication of high policy issues precisely because we are assured from the start that courts will confine their speculation to a relatively narrow range of value alternatives. As with the secure totalitarian regime which can begin to tolerate a neutral referee, we permit judicial space because we know fairly well in advance what courts are likely to do within that space. This of course suggests an eternal paradox of freedom in general: societies and regimes usually grant freedom when they are reasonably confident that individuals will exercise it in conformity with certain basic norms — in other words, when those receiving freedom are already *un*free in the sense of having been conditioned by common habit, custom, and ideology.[9]

Is political justice ever acceptable? Kirchheimer adduces two possible justifications: (1) political justice may be harmless, as when the purpose is to bolster the public image of a regime or to put an official stamp on the already achieved defeat of a political opposition, or (2) the alternative to political justice may be worse, as when a regime would act more arbitrarily and perhaps violently if it had no recourse to the courts.

But these justifications will not wash. For political justice can never be harmless when the result is to send a man to jail or when the merits of

1. The legal risks to the client are well known. But the lawyer's troubles after trial may be virtually as painful. See Sacher v. United States, 343 U.S. 1 (1952) (criminal contempt conviction of counsel for Smith Act defendants upheld), Sacher v. Association of the Bar, 347 U.S. 388 (1954) (permanent disbarment set aside as too severe); In re Isserman, 9 N.J. 269, 87 A.2d 903 (1952) (another counsel for Smith Act defendants disbarred in New Jersey), In re Isserman, 345 U.S. 286 (1953) (disbarment sustained by Supreme Court by evenly divided Court), set aside on rehearing, 348 U.S. 1 (1954). See also In re Sawyer, 360 U.S. 622 (1959).
2. Dennis v. United States, 341 U.S. 494, 570 (1951).
3. Debs v. United States, 249 U.S. 211 (1919), Gitlow v. New York, 268 U.S. 65 (1925).
4. Dennis v. United States, 341 U.S. 494 (1951), Scales v. United States, 367 U.S. 203 (1961).
5. Watkins v. United States, 354 U.S. 178 (1957), Sweezy v. New Hampshire, 354 U.S. 234 (1957).
6. Rowoldt v. Perfetto, 355 U.S. 115 (1957). But see Harisiades v. Shaughnessy, 342 U.S. 580 (1952), Galvan v. Press, 347 U.S. 522 (1954), and Niukkanen v. McAlexander, 362 U.S. 390 (1960).
7. Kent v. Dulles, 357 U.S. 116 (1958), Dayton v. Dulles, 357 U.S. 144 (1958).
8. Nowak v. United States, 356 U.S. 660 (1958), Maisenberg v. United States, 356 U.S. 670 (1958).
9. Starzinger [Book Review], 71 Yale Law Journal 1364, 1368 (1962).

a particular government are sold to the citizenry like a cake of soap or a compact car. The second justification is not capable of proof because there is no valid way of estimating a regime's response to political opposition if it lacked the opportunity to implicate the judiciary. Indeed, the trappings of legality may facilitate repression by enabling more people to overcome scruples.

It may be objected that to dispose of these two lines of argument does not dispose of the problem. Need a regime sit idly if it is sincerely convinced that a political conspiracy will use force to destroy it, and are not the courts the most available and decent forum for state defensive action? This has been proposed as the testing case for those who deplore the use of the judiciary for political ends.

A response must initially draw the line between political conspiracies that have resorted to violence and those that are yet inchoate. As to the former, there would seem an inherent right of self-defense, as well as the right to judicial enforcement of laws designed to punish acts of insurrection. The real question is how to handle conspiracies that are in the talking stage. As to these, one must for himself accept or reject Kirchheimer's conclusion that political justice is fundamentally inconsistent with "the essence of the . . . democratic political system, [that is,] majority rule with unconditional protection of minorities, including the right to turn into a majority." (p. 169) Kirchheimer's premise, of course, is that if a minority is disposed to act through force rather than ballots it will be time enough to thwart such action when it occurs; in the meantime, the political process should be open to all points of view, and let the chips fall where they may. The alternative course of proceeding against a conspiracy before it acts violently not only imposes intolerable burdens on the judicial system, but also opens the door to elimination of political enemies through the convenient self-delusion that force is inevitable and imminent.

But will there be time for successful defense when the enemy finally strikes? The answer to this highly practical question may not be the same for all governments and for all times. The period since World War II provides material for arguments on both sides. The coup d'etat in Czechoslovakia may be thought to illustrate the perils of leaving jail cells empty for too long. On the other hand, an observer of the American scene can conclude that there has been insufficient risk of violent overthrow of government to justify the political trials under the Smith Act and the McCarran Act.

Kirchheimer believes that when a regime resorts to the courts for political ends it is responding to the twin spurs of fear and self-doubt. The dedication of the present volume to "the past, present and future victims of political justice" suggests the author's conviction that these motivations will continue to induce governments to contain domestic enemies with the aid of the courts. Those devoted to freedom will join Kirchheimer in regretting this, while recognizing at the same time that the problem is many-sided and subtle, and that the absolute undesirability of invoking political justice has not yet been justified logically or historically, and perhaps cannot be.

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stitute of International Relations in Moscow. Kaznacheev's descriptoins of the latter are among the most interesting parts of his story.

Graduating from the IRI in 1957, Kaznacheev was sent as a "probationer" to the Soviet Embassy in Rangoon. Within a year or so, he was co-opted into "the most elite of all Soviet Intelligence units operating in Burma," the Political Intelligence group. The bulk of the book consists of detailed descriptions of the organization and functions of the various Soviet agencies in Burma, both inside and outside the embassy. Interwoven with this material are anecdotal accounts of personalities and relationships within the official Soviet family. Brief factual statements and Kaznacheev's analyses of Sino-Soviet relations are also included.

It is impossible for an outsider to establish the reliability in detail of an "insider's" story. *Inside a Soviet Embassy* is fictionalized at least to the extent of purporting to present verbatim reports of conversations and statements. But this is a standard technique which may owe as much to Mr. Simon Wolin who edited the book as to Mr. Kaznacheev. The general descriptions of the intelligence functions of Soviet diplomatic and other missions and of the internecine distrust within such missions are in accord with evidence on these points from other sources.

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KIRCHHEIMER, OTTO. *Political Justice. The Use of Legal Procedure for Political Ends.* Princeton, N.J., Princeton University Press, 1961. 452 pp. $8.50.

The author of this book, Professor of Political Science at Columbia University, has dedicated his work "To the past, present and future victims of political justice." This dedication reflects the author's sceptical attitude toward what is called "political justice."

The reader will not be surprised therefore, when the author characterizes political justice as a disguised repression or revenge on the part of the regime in power. He cites numerous examples from the practices of very distant periods of human history as well as of modern times, notably the Fascists, the Nazis, and the Communists.

"Every political regime has its foes or in due time creates them," writes Kirchheimer, and it seems inevitable that foes initiate the fight against a regime while the latter tries to exterminate or terrify them. A political trial is one of the possible and most suitable means of such a fight. Kirchheimer characterizes three categories of political trials: "The trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution; the classic political trial: a regime's attempt to incriminate its foes' public behavior with a view to evicting them from the political scene; and the derivative political trial, where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe" (p. 46). The worst kind of a political trial is "a spectacle with prearranged results." Such are the trials under the modern totalitarian regimes.

Kirchheimer does not limit his work, however, to the exposition of the negative sides of political prosecution in the disguised form of legal trials. He emphasizes also the significance of genuine justice. To a regime for which "a free competition of ideas and social forces is anathema" he opposes the rule of law when the opposition is protected by law and is not prosecuted for merely disagreeing with the existing government.

Kirchheimer's book will be of great usefulness for politicians, judges, law-makers, and teachers of law.

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LANDSBERGIS, ALGIRDAS and MILLS, CLARK, (Eds.). *The Green Oak.* New York, Voyages Press, 1962. 117 pp. $5.00.

Book

POLITICAL JUSTICE, THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS. *By* OTTO KIRCHEIMER. (*Princeton University Press; London, Oxford University Press*, Pp. xiii+452. 68*s.*)

Laws of history can be bold and bad, or like Professor Kirchheimer's. For this is not primarily a work of legal or historical scholarship, but an attempt to bring all the phenomena in this field under covering laws, without actually cheating. If enough laws can be found, then there is no longer any need to juggle with concepts or to suppress evidence in the service of one law (Marxists obviously cheat). It is not surprising, therefore, that the number of laws employed increases in direct proportion to the evidence amassed. It is only necessary to alter the many sentences built round the verbs 'may' or 'might' to a narrative form to measure the success, or failure, of this technique. For example (p. 114): 'the parties might expect a more favourable

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outcome if the scope of the inquiry were limited . . . But the opposite proposition might be equally true.' In fact Kirchheimer proves both. From this use of a one-for-one correspondence between phenomenon and law it is easy to take the dubious step of 'disproving' any logically possible prediction by showing that it did not happen: 'German judges . . . might have brought the mild manifestation of the Communists under the free speech guarantee' (p. 207). A subsidiary fault is Professor Kirchheimer's failure to discriminate between the irritating neologism and the misleading anachronism—a lapse not unconnected with his original sin. For instance, the behaviour of Guillaume du Vair (fl. 1590) is called: The Case of the Successful Loyalty Shift. But loyalty in this sense was born around the time of Truman's Executive Order of 1947.

This is, then, a disappointing book. There is a lot of learning in it, and the analysis can be perceptive. But the chosen method seems to the reviewer to be misconceived and sterile.

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