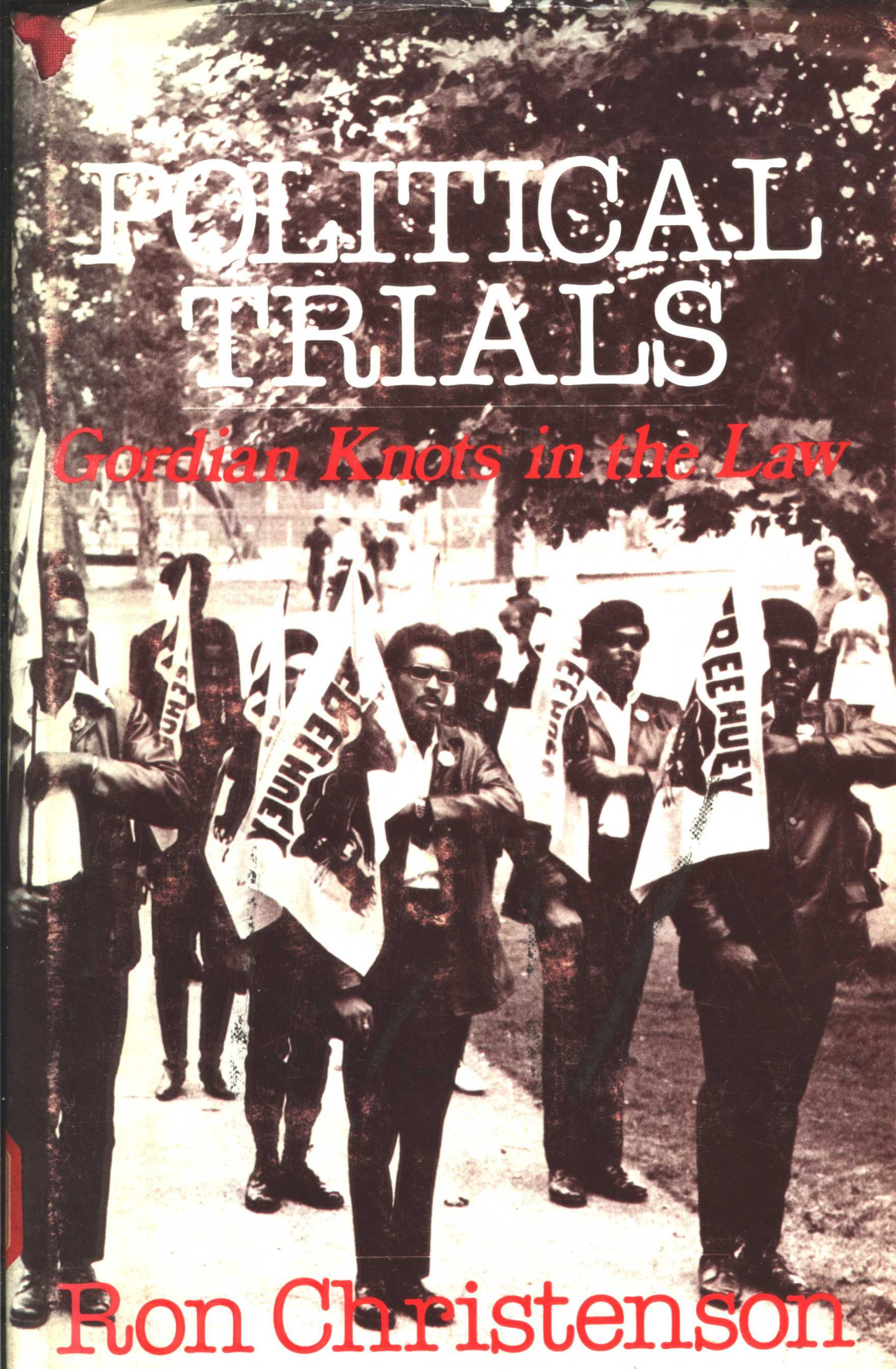
POLITICAL TRIALS

Gordian Knots in the Law



Ron Christenson

POLITICAL TRIALS:

Gordian Knots in the Law

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Transaction Books
New Brunswick (U.S.A.) and Oxford (U.K.)

Library of Congress Catalog Number: 86-1066
ISBN: 0-88738-076-X
Printed in the United States of America

Library of Congress Cataloging in Publication Data

Christenson, Ron.
Political trials.

Bibliography: p.
Includes index.
1. Trials (Political crimes and offenses).
2. Political crimes and offenses. 3. Trials
(Political crimes and offenses)—United States.
4. Political crimes and offenses—United States.
I. Title.
K543.P6C56 1986 345'.0231 86-1066
ISBN 0-88738-076-X 342.5231

For Kate, Rolf, and Abbey

Acknowledgments

The framework for the book is a 1983 article by the author, "A Political Theory of Political Trials," reprinted by special permission of the *Journal of Criminal Law and Criminology*, © by Northwestern University School of Law, Vol. 74, No. 2. Also, from *The Trial of the Catonsville Nine*, by Daniel Berrigan, © 1970 by Daniel Berrigan, S.J., reprinted by permission of Beacon Press.

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Preface

This book began with a simple question raised by a student in my Jurisprudence class: What is a political trial? My response was the generally accepted standard answer, that political trials are attempts by regimes to control opponents by using legal procedure for political ends. It was based on a book for which I have immense respect, Otto Kirchheimer's *Political Justice*. But my response satisfied neither me nor my students. With the trials of the Chicago Eight, the Boston Five, the Catonsville Nine, and Dennis Banks and Russell Means fresh in our minds, and after having had Leonard Weinglass, William Kunstler, Russell Means, and later Fr. Daniel Berrigan on campus as guest lecturers, the standard response to the question seemed vastly oversimplified. More questions about law and politics are raised by certain trials than we can encompass by saying that they involve the attempt of those with power to swat their opponents.

In subsequent semesters of the Jurisprudence class I invited my students to explore the problems raised in political trials by considering, along with the theories of law of H. L. A. Hart and Ronald Dworkin, such issues as are contained in Aeschylus' *Oresteia*, the trials of Socrates, Jesus, John Lilburne, and the Nuremberg defendants, Robert Bolt's play *A Man for All Seasons*, and Samuel Butler's satire of a trial in *Erewhon*. In each instance we asked ourselves: Is this a political trial? What is the difference between what is properly law and what is properly politics? What can the courts do when faced with a case which questions the legitimacy of the law itself? Is the fundamental difficulty that law and politics operate according to diametrically opposite premises: power is its own authority in politics, but the rule of law is legitimate only when might does not make right? Can the law be something more than an instrument of those who hold power—whether direct power, hidden economic power, or subtle social influence? Finally, can we have political trials within the rule of law?

I wish I could recall who in my class asked the question in the first place. I would tell that student, now probably a decade after graduation, that I have a better response: Chapter 1 of this book, with the other nine chapters as elaboration. The law's delay is nothing compared to the academy's.

In addition to my students who ask questions, I must thank those teachers of mine, such as Howard Lutz, Karl Meyer, Arthur L. Peterson, and Mulford Q. Sibley, who encouraged questions from students. "Certain

questions are put to human beings," Leo Tolstoy has taught us, "not so much that they should answer them but that they should spend their lives wrestling with them."

I am fortunate to be teaching at a college which is a community of good will. Cheerful colleagues have provided an informal and running conversation about the questions raised by political trials. They include Howard Cohrt, William Dean, Richard Elvee, Tom Emmert, Marleen Flory, Will Freiert, Michael Haeuser, Norma Hervey, Douglas Huff, Conrad Hyers, Byron Nordstrom, Garrett Paul, David Wicklund, and especially Don Ostrom. Charles Walcott was a dependable driver and listener. I was given time and assistance to work on the project by a leave from Gustavus Adolphus College and a National Endowment for the Humanities Fellowship for College Teachers. The first version of this project was presented at the 1982 meeting of the Academy of Criminal Justice Sciences in Louisville, Kentucky, and received the Anderson Outstanding Paper Award. Versions of chapters 4 and 9 were presented at the 1983 ACJS meeting in San Antonio, Texas. I appreciate the comments of the critics, especially Otis Stephens and Philip Rhoades. I am grateful to several people for their dedicated service in editorial, typing and detail work: Dalia Buzin, Lisa Bushmann, Janine Genelin, Janice Handler, Diane Jensen, Joyce Johnson, Omo Kariko, Joan Kennedy, Julie Lloyd, Nancy Pautz, and especially Saralyn Kriesel. Melody Decker and the staff of the Clerk's Office in the Federal District Court in St. Paul were helpful and patient while I spent a month in their office reading the Wounded Knee transcript.

I am particularly indebted to Ralston Deffenbaugh, Jr., now director of the Office on World Community of the Lutheran World Ministries, who was an observer for the Lutheran World Federation at the SWAPO trial of Aaron Mushimba and others in Namibia. Chapter 3 is his. I wrote it entirely from his materials and notes. In some places I simply used his words. Ralie, in addition to being coauthor of chapter 3, provided encouragement for the project from the start.

My loyal critic throughout has been my wife, Kathryn, from whom I have learned many things including much about writing. Finally, I value having had the opportunity to work with an editor of the stature of Irving Louis Horowitz.

Ron Christenson

1

What Is A Political Trial?

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

Questions of Law and Politics

What is a political trial?[1] Are political trials better classified as law or as politics? If they are totally political, why have a trial? Since the courts are part of the "system," are all trials, therefore, political? Or, because in every political trial the accused is charged with a specific violation of the criminal code, are no trials political? Is the designation "political trial" pejorative, used when justice seems impossible, or is it merely descriptive, used when more is at stake in a trial than a transgression of the criminal code?

Most attempts to designate a trial as political become mired in the quicksand of motive, in the argument that the prosecution, the judge, even the entire court system, are "out to get" the defendant, or conversely, that the defendant and his lawyers are using the court as a platform in their program to undermine the legal system and accomplish their political goals. Such judgments are fine instances of the genetic fallacy. Legal and political

assessments, when based on a guess at motives, become quagmires. Motives are always numerous and various, and they generally operate at odds with each other. In both law and politics, however, we must make judgments. If we refuse to make judgments, believing that one motive is as good or as bad as another, we will land either in the cynical position that law is the will of the stronger and therefore all trials are political, or in the naive, Panglossian position that none are.

We might sidestep the difficulties of definition by beginning with the ingenuous assumption that we can recognize political trials when we see them. If we can point to a number of trials and say with some confidence that these, if any, are political trials, we might more easily understand the nature of law and politics that precipitates such trials. The trial of Socrates for corrupting the youth of Athens and the trial of Jesus for blasphemy and sedition are most likely to be generally recognized as political trials. We could follow these two classic examples with others: the Inquisition (both the medieval and Spanish versions), the 1431 trial of Joan of Arc for heresy and witchcraft, the 1534 trial of Thomas More for "maliciously" remaining silent when asked about Henry's supremacy in religion, the 1633 trial of Galileo for heretically suggesting that the earth moved around the sun, or the many treason and sedition libel trials in England's Puritan revolution. Are there more certain examples of political trials than those of two kings, Charles I in 1649 and Louis XVI in 1792? Would anyone suggest that the trial of the Irish patriot Robert Emmet or of the treasonist Lord Haw-Haw (William Joyce) after World War II were not political trials? What about the trials of Alfred Dreyfus, Sacco and Vanzetti, or Julius and Ethel Rosenberg?

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

In 399 B.C., while Athens was recovering from the disastrous Peloponnesian War, the democratic leaders Anytus and Meletus recognized that Socrates, who had associated with the oligarchic faction, was a threat to the postwar reconstruction. Two of his students, Alcibiades and Critias, had been ruthless while in power. Socrates, meanwhile, was undermining what small faith the youth had in democracy.[2] Likewise, Jesus presented an internal threat to Rome. Judea was difficult to govern with its mix of nationalist extremists inclined toward terror, such as the Zealots, and such religious fanatics as the Essenes or the followers of John the Baptist. The elders in the Sanhedrin, who had authority in Jewish law, regarded Jesus as a threat to the delicately balanced political relationship with the Roman

governors. Further, he was a peril to Jewish law. His activities during Passover, driving the merchants and money-changers from the Temple in Jerusalem, were a forewarning to both the Sanhedrin and Rome. Removing such a troublemaker and blasphemer from the scene, one hailed by the mob as "King of Israel that cometh in the name of the Lord," could be defended as best for imperial and community interests. The full force of Rome, in fact, did move against the next generation in Jerusalem (70 A.D.).[3]

Similar sensible arguments can vindicate other notable political prosecutions. Joan was given every chance by her examiners to acknowledge that her "voices" were not superior to the authority of the church. She was admonished to return to the way of salvation but persisted in her heresy.[4] The interrogation of Thomas More was designed to secure his compliance, not his execution. Henry VIII and Thomas Cromwell desired the assent of More, the ex-chancellor, to the new policy of supremacy and to the revised order of succession after Henry's marriage to Anne Boleyn. When Henry learned that Pope Paul III had intervened by elevating More's fellow prisoner, John Fisher, to cardinal, he exploded. Only then did he set in motion the machinery that led both More and Fisher to their death.[5]

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

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

With the perspective of time, the postwar trials of Dreyfus, Sacco and Vanzetti, and the Rosenbergs can be seen as products of hysteria: anti-Semite, antiforeign, and anticommunist. Nevertheless, at the time, highly respected leaders of opinion looked into the cases and put the weight of their influence behind the convictions. The French General Staff was intractable in its support of the court-martial of Captain Dreyfus, and the entire French society was divided. France had lost Alsace and Lorraine to Germany; Dreyfus had been born in Alsace, and it was evident that someone assigned to the General Staff had passed information to the German

Military Attaché Schwartzkoppen.[10] A distinguished committee composed of Harvard president Lowell, MIT president Stratton, and Judge Grant, advised Governor Fuller against clemency for Sacco and Vanzetti.[11] The Supreme Court, in a six-to-three decision, refused to stay the execution of the Rosenbergs.[12] President Eisenhower refused clemency, explaining that "the Rosenbergs have received the benefit of every safegaurd which American justice can provide. . . . I can only say that, by immeasurably increasing the chances of atomic war, the Rosenbergs may have condemned to death tens of millions of innocent people all over the world."[13] If the passage of time has brought the consensus of considered opinion to a different conclusion in each of these cases, we have, after all, the advantage of historical distance and hindsight.

As the Dreyfus, Sacco and Vanzetti, Rosenberg, and many other cases illustrate, political trials have served societies in crises by providing a method of righting their psychic balance. Revenge is among the most ancient and persistent of political motives. A just trial may bring the revenge cycle to a halt, but an unjust trial will encourage the wronged faction to "get even" and "right the balance," next time in their favor. In the sixteenth and seventeenth centuries the English partisans swung the pendulum of revenge, taking turns to demonstrate by trial and execution the treason of their opponents and generally ending with a show of their own perfidy.

Two trials from the French Revolution are examples of how in political trials societies seek a balance of injustice. First Louis XVI and then thousands of others were made to pay during the Reign of Terror for the sins of the ancien régime. Likewise, after the fall of Robespierre, Gracchus Babeuf and his followers in 1797, during the Directory, paid for the excesses of Robespierre's Committee of Public Safety. Louis and Babeuf were accused of treason: plotting against the revolution in one case and advocating revolution in the other, but for French society the significance of their trials reached far beyond even these expanded indictments. Louis represented the old order and was guilty of being king. "Louis must die," Robespierre told the convention trying Louis, "because the nation must live."[14] Babeuf represented the Jacobins and was guilty of being a revolutionary. In trying Babeuf the Directory sought to prove the same that Robespierre had in the trial of Louis: that Babeuf was an enemy of the people. To make their point, Babeuf was pulled through the streets to his trial in an iron cage, the same indignity the Austrians had earlier inflicted on the French.[15]

Not all political trials contrive to set up scapegoats. It is the thesis of this book that certain political trials are creative, placing before society basic dilemmas which are clarified through the trial. These trials become crystals for society. In them we can see the issues we must face and can better

understand the choices we must make. But trials are not chess games which proceed according to exact rules, rigorous though the rules of evidence may be. Trials are, first and foremost, stories.

This book is written from the conviction that law is more than a system of rules. It emerges out of a tangled maze of stories. The rules are there to be found and are important. But they are found by lawyers and are important mainly for lawyers. Lawyers often set aside the stories. Law students and lawyers search for the law, even in our common-law tradition, by reading through appeals court opinions to find the rule, where the court says "We hold that. . . ." Given the vast number of cases, it becomes necessary to treat their accumulation as a code book full of holdings which become rules, and it becomes convenient to regard the one hundred-plus volumes of *Corpus Juris* as the literal embodiment of the law. Yet the wisdom of the common law is in the stories.

No matter how distilled the stories become and how thick the code books, the spirit, if not the body, of the law is in the stories. Certain stories, that is. They are the ones that shape our thinking about the dilemmas of law, influence our sense of justice, and change our morality. They do more. They provide society with a crucible for defining and refining its identity. These are the political trials. They are less useful for lawyers to build their cases upon than they are as the common possession for all society to use in clarifying what it stands for and why.

Aesop ended his stories with a moral tag. Would we remember or even care about any of his fables if they were distilled to a compendium of the moral tags? The message is contained in the tale of the frogs who asked for a king, the hare and the tortoise, the fox and the grapes, or the lion and the vixen. When we repeat an Aesopian story we can get the point across without employing the tag, and if we do want to include it we have to look it up to get it right.

What is the moral of the story of Hamlet? We learn the most from stories with no moral tag. Is there a moral to the story of John Peter Zenger, who was tried and acquitted in 1735 for seditious libel when he published articles critical of the New York governor? Seen from the lawyer's perspective the Zenger trial might carry the restriction, "good for this day only." The Zenger trial, as Leonard Levy demonstrates, is not important as a precedent.[16] The legacy of suppression continued long after Zenger's acquittal. Yet Zenger's case shaped American thinking about censorship and freedom of the press. It did more than any other single event to fix the meaning of the First Amendment. We can see even greater significance in the trials of Socrates, Jesus, Joan of Arc, and Galileo, none of which embodies legal precedents. They are vital because of their stories, not because of their rules and precedents.

The law, on the other hand, needs rules and codes. If the law were only stories, we would be lost in a house of mirrors. Wherever we looked we would see only ourselves, most of the time in grotesque distortion, and we would never find our way out. A painting without a title can pass judgment at a show, probably win a prize. While the artist may let us draw our own conclusion without the help of a tag, a judge, lawyers, and anyone concerned with law must have rules and codes in common. Art might do nicely without a canon, although this proposition itself has for centuries been an issue of dispute. The nature of law requires that it be a public standard. If it is not, it is not law.

Law is a combination of story and rule. H.L.A. Hart defines law as the union of primary and secondary rules. The primary rules give us our sense of obligation; the secondary rules correct uncertainty, provide modes for change, and offer remedies for inefficiency in the law.[17] This book will amend Hart's definition by arguing that law is the union of primary stories and secondary rules. Certain trials present stories of such consequence that society's common understanding of basic issues of politics derives from them. We change the rules of law accordingly as our understanding is revised by these stories. That is what makes the stories primary and the rules secondary. Most trials do not embody such paradigmatic and society-shaking stories. Few do, but those few present such basic dilemmas as to engage our common deliberation as a public. These trials compel us to examine our fundamental values and perhaps revise them. Such primary trials become our teachers.

We learn from political trials great and small. Certain trials, for instance the Chicago Eight trial or those of the Rosenbergs or Sacco and Vanzetti, characterize an era. We can see a generation's conflicts in one trial, and we understand the generation by understanding the trial. Other trials define a nation, and one or two—Socrates' and Jesus'—represent all Western civilization. Many other political trials, on the other hand, are mere specks when viewed against the landscape of history. The list of political trials in the appendix contains both those of world-historic primacy and those that are not. Likewise, certain chapters will give considerable attention to what might be historically insignificant trials. The Karlton Armstrong trial, for example, hardly ranks as important when set beside the trials of Thomas More, John Lilburne, or John Peter Zenger. Yet Armstrong's trial rates an entire chapter, and the others do not. Such apparently inequitable treatment implies no relativity of judgment. Some of the lesser trials provide either convenient instances or clear examples of the issues raised in political trials. The Armstrong trial is a vivid contrast to the trials of dissenters who acted from conscience, although Armstrong's defense was an indict-

ment of the Vietnam War. The cases selected for attention in this book, in short, provide a way of untying knotty problems.

Gordius is said to have tied a knot so convoluted and tight that whoever was skillful enough to untie it would command all Asia. Many made the attempt, but none untied the knot. When Alexander the Great failed, he whipped out his sword and cut the knot.[18] Political trials present Gordian knots. While a court may cut through the issues with a rule in a sharp decision—the defendant may be convicted or acquitted—the dilemmas of responsibility, morality, representation, or legitimacy remain. The story and its dilemma continue no matter how the court decides.

This book concerns itself with political trials within the Western tradition. Given the long history of that tradition and its global influence, this is hardly a small bite. Certain features of the legal and political institutions of the West combine to produce political trials which in other traditions, such as the Chinese, would not be as clearly defined. In the Western tradition legal institutions are set against other institutions, distinguished from, although strongly influenced by, custom, morality, religion, economics, and politics. The tension between the legal and other institutions, especially the political, is further tightened in the Western tradition by the acceptance of the rule of law. The state is bound and limited by the law.[19] Those who possess power cannot use it arbitrarily. As a consequence of our relative legal autonomy plus the rule of law holding those with power accountable, political trials appear regularly and seemingly naturally. Further, political trials, as this book seeks to demonstrate, assist in the organic growth of the body of law. In crises the tension between reality and ideals, between the stable and the dynamic, between the immanent and the transcendent, produces change. Much of this change comes in courtroom confrontations when each side attempts to persuade not only the judge and jury but all society and even history. The Western legal tradition, as Harold Berman delineates it, has a built-in mechanism for change: "The law is not merely ongoing; it has a history. It tells a story."[20] If, in short, political trials are primarily a Western phenomenon, as products of a fundamental inner logic within that tradition, they are integral to it and contribute to its development.

A Typology of Political Trials

Political trials differ from ordinary trials in the questions they raise. Criminal trials with no political agenda naturally raise difficult questions of law. Matters of due process, from controversies over search and seizure or the *Miranda* rights to whether the death penalty is a cruel and unusual

punishment, can hardly be dismissed as easy cases. However, ordinary cases do not involve the dual legal and political agendas that political trials simultaneously address. More precisely, ordinary trials within a constitutional framework operate from a legal agenda with only a trace, if any, of the political agenda. Conversely, partisan trials proceed according to a fully political agenda with only a façade of legality (although the legalism might be turgid). Political trials within the rule of law juggle the two agendas.

The distinction between political trials within the rule of law and partisan trials which substitute political expediency for law is not new. At root it is Aristotle's, paralleling his basic classification of constitutions. Aristotle found that a polity guided according to the common good, in which authority is exercised for the benefit of all members of society, is fundamentally different from one controlled in the interest of the rulers alone, in which those with power use it to their own advantage and not society's. Regardless of the number holding power, whether one, few, or many, the key is the purpose of power: the common good or a partisan advantage. Constitutions of the former type Aristotle called "*right* constitutions," and the latter "*wrong* constitutions, or perversions of the right forms."[21] The perverted forms are despotic, modeled after a master/slave relationship, while the right forms follow from an association of equals. So it is with political trials. Partisan trials carry the stamp of despotism, while political trials within the rule of law presume that all are equal before the law. They are fair trials despite their political agenda.

A further classification of political trials would categorize them into four types according to the basic issues of politics brought into question: (1) Trials of public responsibility. The nature of the public realm is at issue and the underlying questions are of two types: For an official in corruption cases, where is the line drawn between private life and public duty? For an accused in cases involving insanity, where is the line between actions of public responsibility and those for which a person cannot be held responsible? In both the question is what things are public and what are private? (2) Trials of dissenters. Here the correctness of both public policy and methods of dissent is at issue. The dissenter asks: Is the policy immoral? The dissenter in turn is asked: Is the dissent appropriate? (3) Trials of nationalists. A more basic issue, the nature of representation, is raised here, and the questions become: Is the government representing one people yet ruling another? Does this national group represent a distinct people? (4) Trials of regimes. The most fundamental issue of politics, the nature of legitimacy, is undertaken when one side asks: Was the former government legitimate? The other side responds by asking: Is the court legitimate?

We should note the progression from the issue of the relationship of public and private realms, to judgments about policy and dissent, to con-

flicts over representation, and finally to the critical matter of legitimacy. This escalation from a political trial of a rather common variety to the rare breed puts the court, the law, and the political order in increasing difficulty. Each type presents a Gordian knot tied successively tighter. The chart on the following page illustrates these types.

Political trials which proceed within the rule of law have their corresponding partisan trials. Trials of corruption can become mere trials of revenge. This is apparently what happened to Anne Boleyn and Marcus Garvey. Trials of dissenters can become a convenient way to eliminate the opposition, as the trials of Socrates, Thomas More, and others who have questioned public policy illustrates. Trials of ethnic nationalists, from the Spanish Inquisition against the Jews to the "terrorist" trials in South Africa today, can become a step in the establishment of domination or elimination. Finally, a trial of a regime has the capacity for being purely partisan, victor's justice. The issue in all partisan trials is the same: expediency in the use of power.

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

Synopsis

The chapters in this book are of two types: those that explore trials raising issues of partisanism, responsibility, dissent, representation, and legitimacy, and those that take an intensive look at one trial. The latter chapters are an attempt to tell the story of a specific trial in detail. Although in the general chapters certain trials will be focused upon, they will be used as illustrations of the issues analyzed. Three trials—the SWAPO trial in 1976, Karlton Armstrong's in 1973, and the Wounded Knee trial in 1974—will provide in-depth accounts that go beyond serving as examples.