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POLITICAL JUSTICE AND SYSTEM MAINTENANCE:  
AN OVERVIEW OF SOME MAJOR VARIABLES

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## ABSTRACT

An exploration of some of the major variables which define and set the limits of political justice in a society are presented. Political justice is viewed as the use of the legal process to enhance the power and authority of a regime. It is frequently utilized to impose sanctions, disadvantages, or constraints on groups or individuals whose activities represent actual or potential threats to the maintenance of regime authority.

Political justice is endemic to nontotalitarian societies. Its use and forms of occurrence will vary according to (1) perceptions of existing levels of regime support, (2) perceptions of the scope and severity of threats to regime authority, (3) the type of groups and individuals regarded as the source of these threats, (4) variables such as the levels of consensus and social cohesion within a society, and (5) norms of justice and fairness which may be said to condition and set some limits on the use or misuse of the legal process.

POLITICAL JUSTICE AND SYSTEM MAINTENANCE:  
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I.

The concept of political justice is as important to understand as it is difficult to define. Clearly, it involves the use of the legal process to affect the balance of political power in a society. Often, though not always, it involves the use of the courts and is equated with what are popularly denominated as "political trials." Although legally only individuals are charged with crimes, we may distinguish political justice from ordinary criminal justice by stressing its focus (direct or indirect) on a range of group or class<sup>1</sup> interests other than the individual interests of the defendant.

The traditional focus of political justice studies has been on criminal trials. It might be more comprehensive and more functional to define political justice as an alternative authority enforcement device, an auxiliary weapon to protect consensus, enhance authority and bolster minimum levels of regime support, where ordinary political and legal means are inadequate. Political justice, through legal process, seeks to impose sanctions, disadvantages, and constraints on groups or individuals whose activities represent an actual or potential threat to public order and to the maintenance of the authority of the regime.

Political justice is especially relevant to dynamic societies whose traditional bounds of social order are being questioned. It is a way of managing change before other, more permanent, arrangements can be made---a method of mediating conflict and reducing tensions as the balance of power between groups and interests shifts and the capacity of more formal institutions to fulfill this role according to previously agreed-upon rules lags

behind. Not only is political justice an important means of both adjudicative and nonadjudicative conflict resolution, but in times of stress it may be used to mediate conflicts at a relatively low level of visibility, utilizing mostly short-term solutions, which are not too uncomfortably far from the political center.<sup>2</sup>

This approach to political justice is functional and nonideological. We are interested, as political analysts, in understanding and explaining the existence of a widespread phenomenon--why, when, and how it occurs, and its impact. Most studies have treated political justice as a lamentable pathology or as a sign of political decay. One of the enduring myths of the liberal democratic state is that political justice is an aberration--inconsistent with the rule of law and contrary to the norms and ideals of liberal democracy. But political justice need not be viewed as an abnormality. Indeed, political justice is not unrelated to the existence and to the maintenance of the very liberal principles of which it is said to be subversive.<sup>3</sup> While incidents of political justice often do represent individual excesses, more often and more importantly they are the product of systematic forces at work in a society. Yet, as Balbus has perceptively noted, theories of the liberal state are particularly unreceptive to this notion.<sup>4</sup> The orthodox deny that legal repression is possible, so long as the norms of the liberal state are faithfully adhered to. Of course, such repression does or may occur; they attribute this fact to a failure of individuals to conform to the norms of due process. On the other side, the radical critics simply assert that repression is inherent in capitalist liberalism, and confine themselves to a condemnation of the entire system, including its law and courts.<sup>5</sup> Both views do not help us understand the persistence and compatibility of liberalism and political justice.

Another explanation for the aberrational myth of political justice lies in the subjectivity of the terms involved. In American society there is a common tendency to attribute a negative connotation to anything described as "political." The terms political and justice are viewed as antithetical. A "political" solution is one which emphasizes bargaining, compromise, expediency, and value relativism. "Justice" represents a different set of values. Whatever one's choice of definition, justice is associated with such concepts as fairness and rightness--a moral constant in a world of declining and relativistic virtue.<sup>6</sup> The emotive discordancy between the two terms is acute.

Lack of agreement on a definition of justice is also part of the problem of defining political justice. It may be, as John Rawls has suggested, that "justice is the first virtue of social institutions."<sup>7</sup> But this primacy is, if anything, enhanced because it is a relatively vague "cluster" concept, difficult to operationalize and available as an important political symbol to those on both sides of many important issues. Rawls argues that justice provides a necessary (though not exclusive) set of principles for assigning rights, duties, and advantages in a society, and that it serves as a standard for evaluating governmental action. Of course, the existence among individuals of a "shared conception of justice" makes the process of allocation and evaluation substantially easier. But it is not the only value for which a commonly shared conception is an important parameter of social cohesion and integration. Common religious beliefs, shared economic goals and statuses, and common adversaries are just three of many other possible values or conditions which may underwrite consensus and harmony in a society. Moreover, observers often presume a shared conception of "justice" because of some consensus (or lack of

express dissensus) which in fact results from other factors. But even assuming that Rawls is correct, the real virtue of justice may be precisely that it is widely available as a symbol of reassurance--to society and self. Also, though people may agree on an abstract formulation of justice, in concrete operational terms, and in a particular situation they may reveal great stress, disagreement and conflict. (The same is true of such ideals and basic norms as free speech.) It may be that effective justice is always, in the broad sense, political.

Political justice may, and often does, involve misuse of governmental power. But it is not per se dependent on illegal actions by governmental officials. Nor is all government illegality to be described as political justice. Law-breaking on the part of public officials obviously does occur, but political justice may be most effective when it occurs within the limits--though perhaps near the margins--of legality. Edelman has noted the imprecision of legal language, and its consequent impact on the behavior of citizens and public officials alike. Legality and illegality are not dichotomous variables but merely formal representations of the end points of a continuum which defines the acceptability and legitimacy of the acts of citizens and public officials.<sup>8</sup> The law-abidingness of private citizens is often judged according to situational factors, and allowances made (both by law enforcement officials and individual citizens themselves) for conditions which made obedience to law impractical, impossible, immoral or in derogation of other widely held values.<sup>9</sup> So too the legality of official acts is often ambiguous and a matter of degree. The prevailing political climate, the source and degree of threats to its hegemony which a regime perceives, the importance of certain goals, the clarity and

enforceability of applicable legal or constitutional standards, and the perceived costs and benefits of pursuing a particular policy are all to be considered in determining the legitimacy of governmental action. This is not to deny the importance of formal legal rules or standards of justice in guiding official behavior; it merely recognizes their limitations and inherent inflexibility.

Law itself often specifies conditions under which otherwise prohibited government actions are permitted. In the United States, constitutional provisions for the establishment of martial law and suspension of the writ of habeas corpus come to mind. A vast array of less obvious statutes and precedents provide for invocation or exercise of emergency powers by the executive.<sup>10</sup> Some of these are of particular importance to the question of political justice, because they empower the government to deal with groups or individuals in what otherwise would be clearly illegal ways. The removal of Japanese Americans from their west coast homes during World War II was a blatant and large scale example.<sup>11</sup> Few today would support a similar action by the government. Yet in upholding portions of President Roosevelt's executive order, the Supreme Court approved the concept that emergency situations might legitimize even so blatant a repression of individual rights.<sup>12</sup> Similar arguments were made by the government in the recent domestic wiretap case,<sup>13</sup> and by the Nixon Administration in defense of some of its internal security policies.<sup>14</sup> The Supreme Court's rejection of the government's argument--that it had the right to wiretap without judicial warrant in domestic security investigations--may have set some fresh limits.<sup>15</sup> It remains to be seen how effective such limits are in practice. Even where the law does not specifically provide for exceptions to its



rules, it often invites exceptions through ambiguity, and in the complex relativity of means and ends. The chief executive is charged with major responsibility for protecting national security; the prosecutor and policeman with preserving the public order. It is not difficult to understand how these (valid) ends are frequently invoked to justify (invalid) means.

When one moves away from the federal government's concern with "national security"--admittedly a gray area in which the limits of executive power are most difficult to define--to the more mundane relations between government and citizens, and from relatively formal government actions to the murky waters of administrative decisions, the definition of legality is not significantly clearer. Here the discretion of officials is greatest, the visibility of government policies low, and opportunities for misuse of power maximized.<sup>16</sup> Misuse of power is often equated with brutality or overzealousness in prosecuting the opponents of a regime. But, paradoxically, the American tradition of underenforcement of the law may be an equally effective weapon of political justice. Political justice should be seen not only as what government does to its enemies, but also in the disparity between the treatment accorded to enemies and friends.

Our view of political justice does not depend on the motivation of policymakers. Questions of motivation are, in any case, almost totally resistant to objective classification, in the absence of explorations at the individual level.<sup>17</sup> Motivation is also difficult to define. In any event, political justice is an institutionalized phenomenon.<sup>18</sup> It can exist and be effective without "bad intent" on the part of individual actors, and it can fail to have any substantial impact even where such intent is present.

Political justice is rarely the purposive and rational enterprise which is often implied or attributed to it. It shares with other governmental policymaking the common characteristics of incrementalism, mixed motivation, confusion of ends and means, inadequate calculation of political policy impact, inadequate informational base, inadequate resources, lack of cohesiveness, and lack of control over outcomes. Indeed, these problems may be particularly acute in the case of policies of political justice because, by their very nature, they usually cannot be articulated and defended as legitimate government actions.

Our exploration of political justice in this paper will also stop short of a full assessment of its impact. The outcomes of particular political trials are easily observed in terms of the fate of individual defendants. But our view of political justice encompasses more than political trials. It covers a wider range of governmental activities, and the impact of these activities is diffuse and difficult to measure.<sup>19</sup>

The remainder of this paper is a theoretical exploration of the main attributes and functions of political justice. Necessarily it stops short of denoting precise boundaries. For the sake of convenience and conceptual clarity, we will discuss first the goals and strategies of political justice, and then some of the variables most likely to structure its use.

## II

### POLITICAL JUSTICE--GOALS AND STRATEGIES

Political justice is an instrument of government policy, not an end in itself. In its different forms it is most likely to be utilized as a tactic in the achievement of three categories of goals.<sup>20</sup> In the first category

are goals which emphasize deterrence, rehabilitation, or reintegration of target groups. The assumption is that the targeted deviance is largely individual and reparable. In this context the focus of political justice is likely to be cooptative and even ameliorative. Relatively innocuous concessions made by members of target groups, such as symbolic acts of contrition or other reaffirmations of the faith, may satisfy the government. A rehabilitative policy may also take the form of positive rewards granted in return for political acquiescence and support; more subtly it may involve increasing dependency through resource redistribution.

The second category emphasizes containment. It is a more group-oriented policy which may depend on relatively informal restraints but which may also require more formal measures such as the imposition of mild sanctions or disqualification from certain offices, privileges and benefits. It may also involve the passage or use of laws and other tactics by law enforcement officials to harass groups by forcing them to exhaust their resources in self-defense.

The third, most severe, and often most visible category of goals which involves the use of political justice tactics emphasizes repression, retribution and, ultimately, extinction. It is directed at groups or individuals whose very existence is so threatening to the regime that co-existence is impossible. Rehabilitation or containment are rejected for either practical or ideological reasons.

These categories are not mutually exclusive, either in the definition of goals or in the choice of means. The use of a particular tactic or strategy is as likely to depend on available resources or "traditional" responses to certain types of provocations as it is to reflect carefully

planned policies. As with many other governmental policies, means become instrumental in the determination of goals; goals are often articulated belatedly to explain means. And as with other policies, the public explanation of a government's behavior may be designed to meet external standards, such as legality, regardless of the operative tactical goals. The choice of tactics is also dictated by the perceived imminence and severity of threat of the target group and the possibilities of resolving the group's differences with the government by less formal and less drastic means. The more dangerous a group, the more it is perceived as committed to its anti-system goals, the lower the threshold at which increasingly more repressive countermeasures are likely to be initiated. Conversely, no matter how far apart a group is from prevailing norms, it is not likely to face repressive government action if its behavior, ideology, and life style are not perceived as imminent or credible threats--at least not beyond some mild form of stigmatization of low-level harrassment. The role of government at this end of the continuum may be limited to intelligence gathering through surveillance of informers.

Most studies of political justice have focused on the courts, and especially on the "political trial" as the primary form of political justice. Yet Kirchheimer was undoubtedly correct in viewing the political use of the courts as essentially a middle range policy, "neither the most incisive nor the most frequent form." He saw the role of the courts as particularly useful in completing repression or harrassment, in the dramatization of the legitimacy of a regime's policies, and in rallying political support.<sup>21</sup> Political trials may be particularly useful in affirming official policies, stigmatizing those who oppose them, and developing popular support for those

policies and encouraging distrust of--and perhaps privately organized measures against--regime opponents. We refer here to their potential; political trials can be quite risky to a regime. They may backfire badly; thus the motivation to undertake such trials must be quite strong.<sup>22</sup>

Kirchheimer also noted that where large numbers of persons were involved, administrative procedures might be more effective than political trials.<sup>23</sup> Courts are simply not set up to handle mass trials (witness the difficulties, even with prior planning, in processing and in justifying the processing of persons arrested in the course of urban riots).<sup>24</sup> The shortcuts which must be taken and the high visibility of images conveyed by such procedures produce enough negative symbols to effectively undercut whatever gains in regime legitimacy and support might otherwise be realized. Besides, courts are limited to those situations where regime opponents have committed, or can be charged with, criminal violations. Even allowing for the flexibility which the government has in defining crimes such as conspiracy, this still leaves a considerable range of "subversive" activity which cannot be packaged into a criminal charge. The bureaucratization of political justice offers one rather underexplored alternative. It is likely to be particularly efficacious if we are concerned not only with the overt, obvious, and easily identified political crime, but with a range of less visible, less overt, and less easily definable acts which, additively, may have an equally profound and disturbing effect on the maintenance of the system.

Alan Wolfe has classified "repressive laws" in such a way as to accommodate a range of strategies wider than use of criminal law alone.<sup>25</sup> Wolfe recognizes that the forms of legal repression may be judicial, administrative,

and executive. Wolfe distinguishes among the following: (1) harassment laws, such as vagrancy statutes, whose original intent was more neutral than its current repressive use (he ignores the long-time repressive use of the law of vagrancy); (2) obligatory laws, such as the selective service act, which impose obligations generally but which fall most heavily upon certain disfavored groups; (3) inclusion laws, which are designed to affix labels which might form the basis for later discrimination, e.g., laws about aliens; (4) process laws, such as the conspiracy statutes, which punish not illegal acts but the process of planning illegal acts; (5) public order laws, which criminalize riotous and other forms of disorderly conduct or require permission for parades or otherwise limit political expression; (6) preventive laws, designed to control those who are potentially disruptive; and (7) explicitly political laws, such as the various espionage and sedition statutes which, in Wolfe's view, tend to follow rather than cause the repression and devitalization of deviant groups.<sup>26</sup>

Suggestive as they are, Wolfe's categories are too legalistic and confining. Laws can be put to different uses, depending on the situation and the objects of attack. For example, containment may be achieved in a number of ways, and may include tactics of harassment. Containment may succeed merely by discrediting ideological foes; or it may capitalize on intragroup conflicts of differences in the vulnerability of group members. Weak group members may be coopted into informer roles, or into accepting some mainstream values and working for these values within the group. Thus it seems better now simply to recognize that there are clusters of strategies which may contribute to harassment, containment, or retribution, and that the success of particular strategies is an empirical question very much dependent on circumstance and situation.

## MAJOR VARIABLES DEFINING SELECTION OF STRATEGIES

Allowing that political justice is not a perfectly rational enterprise, it is helpful to assess how close it does--or might--come to such a standard. Ideally, some form of cost-benefit analysis would precede any decision to pursue a particular strategy for political justice. Such a calculus would necessarily involve agreement on what a particular regime would require to maintain authority. How much authority might be gained--or lost--from following a particular strategy? What are the consequences of failure--or only partial success? Is failure more costly than mere inaction? Will a particular tactic provoke the sort of resistance that strengthens the opposition and requires further--and perhaps excessive and even more costly--government action? What about backlash? Tactics of political justice are often pursued not so much for their effect on target groups as for their value in providing symbolic reassurance to supporters of the government. Government acts as an agent of one group in trying to repress another. But there is always the risk of losing some support. Tactics which exceed acceptable norms of procedure may alienate one segment of support, while tactics which are insufficiently positive and authoritarian may alienate another. Efforts to meet both types of criticism would be contradictory and might serve to expose the weaknesses of a regime, instead of adding to its authority. And there is always the problem that intensive efforts to eliminate deviant groups may escalate into a much larger sphere or more intense conflict which the regime is not equipped to handle.

At the foundation of any determination of strategy is a set of assumptions about existing levels of regime support, about popular commitment to

compliance with law, about popular tolerance for marginally legal tactics (which, of course, may depend on who, and how dangerous, the opposition is perceived to be), and about the utility and efficacy of coercive sanctions. How do subjects generally, and dissidents in particular, view the regime? Are we talking about fully allegiant citizens, or citizens who may comply but not really support the political order? In Richard Rose's terms, is the regime seen as fully legitimate in the eyes of its dissident subjects?<sup>27</sup> Is their opposition to specific policies, to the regime generally, or both? These are important questions which are not canvassed adequately in strategic planning, yet which may powerfully affect the outcome. Rose argues, in the context of his study of Northern Ireland, that in a regime which is not fully legitimate the institutions of law may contribute mainly to disorder.<sup>28</sup> It remains an important empirical question to determine if this observation is applicable in the United States. But there is enough partial evidence to suggest that it is.<sup>29</sup> In communities where the police or courts are viewed as repressive, even "proper" law enforcement techniques are viewed as provocative efforts of repression. There are many implications of this observation. For our purposes it serves mainly to remind us first that law is not per se an alternative to or a means of preventing political justice. A "legal" or "legalizing" solution may be viewed very differently by those who accept or reject the basic legitimacy of legal institutions. Second, the observation serves to emphasize the convergence of roles and perceptions that constitutes one of the main operative components of political justice. Political justice is not just what government does to its enemies, but what grows out of a set of relationships between government and its opponents.<sup>30</sup>



Within this framework we extend our inquiry by concentrating on two sets of variables: societal norms of justice and fairness which limit the options of political justice; and the nature and perception of threats.

Norms of Justice and Fairness. In any society there are likely to be a set of norms which define the boundaries of acceptable use of the legal process, and of political action generally. In the United States the most important is the emphasis on the rule of law itself and the notion of fairness which not only pervades the legal process but contributes importantly to those perceptions of legitimacy which underwrite support of political regimes. As we have seen, the concept of justice is very complex, but certain fundamental aspects stand out. For example, one can differentiate conceptually between procedural and substantive justice. The former is concerned with rules and processes by which public and private decisions are made. The latter is concerned with outputs and outcomes, and focuses on the distribution of commodities like wealth, honor, status, and material goods. It is often called distributive justice, and may include also a negative or corrective component such as punishment or penalty for the commission of a wrongful act, and the assessment of compensation for damages done to others.

Procedural and substantive justice are often separated analytically, but in practice they are interrelated. Procedural rules may be neutrally applied to all fit cases, but they are rarely neutral in the sense of value-free. It is more than theoretically possible, as Edmond Cahn has noted, for fair procedures to mask substantive injustice.<sup>31</sup> Typically, this is one of the forms of what is called political justice. Law is not so much a set

of rules for the control of private interests as it is a reflection of such interests as have acquired dominance in political, social, and economic life. What one group sees as fair another may view as oppressive. What the law enforces is likely to be the set of interests which is most powerful in a community, or for which adequate supporting resources exist. The quest for justice is not an armchair undertaking in logic, but a real and often brutal competitive undertaking in which abstract conclusions about what is right play but a limited role.

Even where nominally fair procedures exist they are not likely to produce equitable results when applied to individuals of markedly different resources.<sup>32</sup> Under certain conditions recourse to the courts may narrow the gap or reduce the advantages caused by unequal resources. But it may also favor those already advantaged. However advantages are computed, the government is almost always advantaged when it goes to court. Thus, theoretically fair procedures may not only mask substantive injustice but exacerbate it.<sup>33</sup>

In the United States, procedural justice is most often symbolized by the evolving concept of "due process of law." In its legal context, due process is associated with the right to a fair hearing, to adequate notice and opportunity to defend oneself against charges, and the right to be judged by an impartial arbiter according to a set of previously determined rules.<sup>34</sup> It is also the right of equality of treatment by agents of the government--equality in relation both to how others are treated, and to one's individual capacities and needs.

The thrust of the idea of just procedures is not limited to government action. The idea pervades many social processes, and governs a wide variety

of private relationships and efforts at dispute settlement. It has become a forceful standard of judgment for the law and official action, constituting, in Lon Fuller's phrase, the "inner morality" of law and the basis of its legitimacy.<sup>35</sup> Indeed so pervasive is the idea (even allowing for differences in its basic formulation) that, under the rubric of "legality" it has become an ideology; for some it is almost a secular religion.<sup>36</sup>

Legality is often equated with justice. As Fuller has said in another context, "If we do things the right way, we are likely to do the right thing."<sup>37</sup> Yet it seems clear that legality and justice are not indistinguishable. Internally consistent rules may not be just in every case. And such rules may not produce just results. To equate legality with justice is to make the untenable assumption that the law has only one end and aim, and that is justice. Yet there are other social functions of law, which may depend on the appearance of justice, rather than on its actual achievement.

Indeed, justice and law are by no means identical. One must remember the distinction between two central strains in the concept of law: law as enhancing and upholding governmental institutions, and law as upholding and protecting individual rights. The chief function of law in many societies is simply to sustain the ruling authorities: this conception is often associated with a culture in which citizens are reluctant to press claims for individual rights. Rights-consciousness is considered vulgar and disharmonious to social unity, and social unity is more important than individual satisfactions.<sup>38</sup>

The idea of law as the embodiment of individual rights is, of course, central to Anglo-American law, and it is that conception on which the

alleged unity of law and justice is based. But the first strain is also present, as indeed it--or some substitute--would have to be in any viable system of legal governance. It is seen most obviously in the criminal law, and in the extensive laws and rules which support the operations of government and government officials and enhance their legitimacy and claim to the right to govern. The arguments in favor of a strong sense of civil obligation and obedience to law rest on the implicit assumption that the government itself is bound by the law. Yet in the final analysis it is the government or its agents which decide what the law means.

The clash between these two strains of law is often resolved explicitly by judicial decisions which weigh the claim of citizen rights against the needs of officials to carry out their tasks. More often perhaps it is resolved implicitly when public officials make discretionary decisions which take into account local customs and pragmatic needs of governance as well as the formal law. Daniel Boorstin has reminded us of the ambivalence with which Americans have traditionally viewed the law.<sup>39</sup> Those who equate law and justice have resolved at least part of that ambivalence by treating law and justice in their most idealistic and complementary form.

It is widely recognized that general rules which appear just may in particular instances produce obvious injustice. Here too the equation of law and justice is less than perfect. In a legal system composed of rules, justice requires some provision for discretion, some leeway for individualization of cases. Rules must be both uniform and equitable. As Harold Ofstad has noted

An impartial judge may be unjust because he sends everybody to the gallows. The kind judge may be intolerably partial if he is kinder to his friends than to his enemies. Impartiality is necessary but not sufficient for justice. Or, in

other words, it is sufficient for--and perhaps identical with--formal justice; but formal justice is only necessary and by no means sufficient for the realisation of material justice.<sup>40</sup>

The optimal balance between rule inflexibility and official discretion is not uniformly or objectively ascertainable. It may be, as the Supreme Court of the United States has recently decided, that the absence of any rationalizing principle in the application of the death penalty makes its imposition unjust and unconstitutional. Yet it would seem open to serious question whether uniform and unremitting application of the death penalty would be more just (although perhaps in the view of some of the current justices it would be more in accord with the constitution).<sup>41</sup>

Kenneth Davis has argued that the application of rules is "principled" while unfettered discretion opens the door to "emotions, favoritism, and politics."<sup>42</sup> His is another version of the ideology that justice is best served in a regime of strict adherence to rule. He may be correct in observing that the legal system contains far too much broad discretion, erring on the side of increasing the risks of arbitrariness (though also the capacity for individualization) rather than on the side of making law too narrow and inflexible to take account of individual differences. The tendency to broad discretion probably reflects the need to accommodate conflicting social norms in a multicultural society, blending these into a system of laws that is nominally uniform. Discretionary power is an important variable in the allocation of advantages to individuals and groups, and a critical component of political justice.

The relationship of social justice to individual justice is also a difficult problem of defining the boundaries of our subject.<sup>43</sup> Justice for individuals is closely related to procedures and the capacity for

individualization; social justice, however, is more than the sum of individual cases of justice; it takes into account the needs of the society as a whole. In so doing, it may have to violate norms which, in an individual context, are highly legitimate. Individual justice and social justice are often competitive if not mutually exclusive. Individual justice requires restraint on state power; social justice is a distributive concept. The notion of equality is important to both. Some argue that equality suggests uniformity. The state must confer upon persons such resources as will produce a high degree of uniformity in possessions and equality of resources and advantages (or withdraw from those with excess resources). A more restricted view is that social justice requires equality of opportunity or access, but not necessarily uniformity in outcome. Each of these views, of course, expresses a different conception of human nature, genetic endowments, and of the relationship of the individual to the state. Though political justice can sometimes be measured by the degree of unequal treatment of groups or individuals, much inequality is unrelated to political justice; certainly the two are not synonymous.

Considerations of what is just for the individual and what is just or possible within the social unit raises the issue of political obligation and consent. These in turn evoke questions about the legitimacy of governing institutions and law, and those who exercise governmental power. Concepts of justice are important standards for evaluating the legitimacy of a regime or of particular policies or acts. Satisfying the norms of justice is an important political resource and a powerful symbol. To assert the justness of one's regime or cause is to deny legitimacy to those who oppose it. For those in opposition the claim of injustice is a potent

battle cry. More important, it may serve to weaken the loyalties of citizens and justify, if not promote, attempts at regime change.

The sources of claims of injustice are numerous. To be most meaningful and politically useful they must be defined within the structure of a political system. For example, the rights of individuals, though often stated in universalistic terms, must relate to the purposes of the political organization of which they are a part. The western democratic liberal tradition of governance is relatively limited in scope. Its aims are to maximize individual justice and freedom of choice, although as some critics have pointed out, liberalism seeks to strike a delicate balance between liberty and order, which necessitates some ambiguity toward the range of permissible individual acts and the appropriate governmental actions needed to maintain order.

Except where the interests of the state are claimed to be paramount, as in security matters, or in the maintenance of public order, the preservation of individual rights is seen as the essence of justice. Where the goals and purposes of the state are greater than the sum of individual satisfactions, as reflected in greater state involvement in economic and social planning (and possibly an official ideology to which all must subscribe), then justice is likely to be defined and measured in social or metasocial terms. In the first instance law may be seen (however inaccurately) as the embodiment of justice. In the second, justice may be achieved through law but is not dependent on it.

Concepts of justice affect the goals and strategies of political justice by establishing standards by which to measure the legitimacy of government action. Yet the complexity and ambiguousness of the subject assures the government some flexibility in its actions. It is at least open to

government, under some conditions, to argue for the right to deviate from the rules where the resulting harm may be sufficiently great. Or the government may be able to sustain the position that attainment of certain ends legitimizes the utilization of means which in the abstract, would be prohibited. The concept of justice is normally a brake on repressive government action; but it may also provide a rationale and a means for sustaining such action under certain circumstances.

One of the strongest assets of "political justice" is that it can often capitalize on this ambiguity to legitimize what might otherwise be easily recognized as repressive action. Relying on the system of justice requires the government to make certain concessions to norms of fairness and law. This reliance may have a payoff which more than justifies whatever concessions must be made. Government reliance on the system of justice may actually increase the dependence of citizens on existing institutions, and increase the manipulative social control capacity of the government. To invoke the protection of the courts, one must acknowledge their legitimacy--at least to the point of playing by the rules. Due process can effectively exist only within an institutional context. Hence due process serves to promote citizen attachment to existing authority, while limiting government and protecting individual rights. If justice is equated with rules, legality, and law, interests and grievances may be deflected away from a focus on substantive issues which, in the long run, the government may find more threatening.<sup>44</sup>

Edelman noted continued strong support for the norm or myth of justice even among those least favorably treated by the justice system, reflecting "the tenacity of widespread cognitions" resistant to change. If this is indeed so, it is strong evidence of the utility and flexibility of the



concept of justice in achieving stability.<sup>45</sup> The desirability of maintaining public support for existing patterns of justice may serve to check some excesses or misuse. On the other hand, the limits within which governmental action is perceived as just are probably broader than most people have heretofore imagined.

Ideally, a regime should follow policies widely perceived as "just" but which at the same time maximize internal order and regime support. A key sustaining function of government is to control the constant--and possibly creative--tension between order and justice. The actions of government officials and government policies, are among the most important inputs into what citizens may view as justice received--or justice denied. Since justice is not always a zero-sum enterprise it is possible to maximize citizen satisfactions across a broad spectrum of the electorate. This is more true of the "symbolic" than the material dimensions of justice, and government policy is likely to be structured accordingly. It is probably not necessary for all governmental acts to be perceived by any single individual or group as uniformly "just." A group or individual assesses justice in relative terms, across a whole band of governmental policies and symbols which concern the individual or group.

Whether or not government chooses to conform, or how closely it chooses to conform, to a legalistic model in dealing with any particular threat is itself a variable of some complexity. Kuykendall has suggested that "legalistic behavior" is emphasized in periods of order and stability while suppressive behavior is emphasized in time of stress.<sup>46</sup> His observation lacks precision but it does effectively focus on the interplay of variables. Justice and order are sometimes symbiotic, at other times almost mutually

exclusive. Justice--both real and apparent--may promote order; and claims of injustice may promote disorder, by withdrawing legitimacy from the government.

Yet justice and order are not always congruent. Cultural factors may be important, as suggested by Goethe's observation that "if there has to be a choice between injustice and disorder...the German prefers injustice."<sup>47</sup> Whether or not this is true of the Germans, it does suggest an endemic dilemma of all societies. At those times when order is viewed as most important, the likelihood of political justice is increased--at least in those societies which also wish to maintain a commitment to justice and individual rights.

Nature and Perception of Threat. A second group of variables likely to determine goals and strategies of political justice is the type of threat and the way it is perceived by the relevant authorities. Obviously subjective questions of magnitude and timing are involved here. Evaluating the severity of a particular threat and the appropriate response is rarely an exercise in objective logic, any more than a regime's self perceptions about its own needs or its prediction about the possible benefits--or costs--to be expected from a particular course of action. A widely pursued course of political justice that is ineffective or that backfires may be far more costly than mere inaction. A particular tactic may provoke the sort of escalated resistance that only strengthens the hand of the opposition and requires escalated--and perhaps ill-considered and excessive--government action. There is also the need to consider a regime's supporters. The goals of a particular strategy may be primarily directed at providing symbolic reassurance to a regime's friends rather than actually doing away

with its enemies. Yet what happens if that symbolic reassurance only provokes more demands by supporters to take more repressive and more risky action against its opponents?

At the heart of this problem of perception is the lack of a consensus on how much public order is needed, how the establishment or maintenance of order relates to the authority needs of a regime, or how to predict the acceptable costs of attempting to achieve one or the other. All this differs between societies, and within a society. What may be threatening under one set of circumstances may be tolerable under another. As Matthew Holden has observed, it is a problem of the "critical mass."<sup>48</sup> A dozen violent crimes in a short time span may provoke demands for stern government countermeasures. A similar number of crimes over a longer period of time, or more widespread geographically, may cause less alarm. Today governments accept a level of verbal criticism and abuse which would have been treated as seditious and libelous in the period after World War I, and regarded as disloyal after World War II. The boundary between political rights and political crime is constantly shifting. Since World War I the trend has been toward enlargement of political rights. This has resulted in new limitations on formal government responses to signs of political disaffection. As a result there may have been some shift in emphasis to less formal and visible tactics of political justice.<sup>49</sup>

The government's definition of acceptable "disorder" today is very much dependent on, but also the creator of, citizen perceptions of what is acutely threatening and what is merely disagreeable. The widespread perception that violent crime is rising and that life in big cities is less safe makes it possible to create a political issue out of "law and order," which engenders support for repressive government action, and for

candidates who advocate such measures. A climate is created which encourages "maximum" penalties for those convicted of crime. And it provides a partial, if self-serving, rationalization for the invocation of other government actions close to the margins of legality.

How the government defines a particular act or series of events is important in several ways. First, its initial response may be critical in shaping citizen perceptions about the acts in question and about its own role in regard to them. Second, as Rose and Miller remind us, the government may limit or define its own response by the way it defines an act initially.<sup>50</sup> If it dismisses a protest demonstration as "merely hooliganism" or as the solitary work of a few dissidents it will not have provided sufficient justification for calling out the National Guard or declaring a state of martial law or otherwise suspending constitutional guarantees. On the other hand, if the government defines the same event as a riot, this has more serious and more political overtones, and government will be expected to react with a greater show of force. But at the same time it will be admitting the existence of widespread dissatisfactions with its policies and greater threats to its power and authority. For the same reasons a government may be reluctant to label an "ordinary anti-social act"<sup>51</sup> as a political crime, especially when it is precisely this label which is coveted by the perpetrators of the act; they see it as a defense (or at least a good appeal to a jury) against charges of illegal acts where the facts are not in dispute and the law itself does not provide an exception for political motivation. If by its verbal cues the government contributes to citizen unrest and insecurity, then by its actions it must seek to alleviate those feelings.

Similarly, flag burning, destruction of draft cards, marijuana consumption, pornography, homosexuality, abortion, petty gambling, and prostitution may not directly threaten the public order or regime stability, but their indirect impact on the political system is considerable. Such practices, even if they do not directly challenge the political system, are often associated with life styles and values which some citizens regard as immoral and as threats to legitimate authority; they may be regarded as more threatening than crimes of violence or "clean" crimes which result in serious economic loss to individuals or to the society.

Such "crimes without victims" often reflect stratification in wealth and power as well as differences in norms.<sup>52</sup> It is not the act itself so much as the fact of deviance that elicits a hostile response and stimulates recourse to the criminal sanction. The President's Crime Commission recently pointed out that Americans see crime in moral rather than social terms; Americans believe that man is responsible individually for his actions.<sup>53</sup> Crime is seen as the result of moral failings rather than as the result of unfavorable environments. This view of crime, associated with what Francis Allen has called the "rehabilitative ideal," has obvious conservative consequences.<sup>54</sup> It ignores the relationship of a particular "criminal" act to its social background, and tends to divert attention from the social consequences of determining what is and what is not criminal. Since the problem is perceived as one of individual deviance, social responsibility is denied, the criminal law is deemed the most appropriate response, and the threats to legitimacy of the regime which the act might precipitate are minimized. Furthermore, the use of "excessive force," or other departures from the norms of enforcement behavior, are more easily justified--both morally and politically--when the cause of deviance is

assumed to lie within the individual. At the same time actions against deviant individuals will indirectly affect the broader causes or groups which represent the real "threats."

Legislatures will typically define deviant acts as criminal offenses. Of course, there is a wide gap between legislative prohibition and judicial enforcement. But the successes or failures of criminal sanctions are not to be judged entirely by the numbers of people charged with crimes. Far more people in the United States who are involuntarily confined to an institution are undergoing "treatment" rather than "punishment." Criminalization of deviant acts (including political crimes) stigmatizes those acts, and brands their associated subcultures as immoral or inferior. It allows those who disapprove to feel morally superior because they refrain from similar indulgences and because they see themselves as acting or thinking in the public interest. This results in a form of symbolic confirmation of values. Many people are less interested in the efficacy of enforcement than in the symbolic satisfaction of knowing that they are on the side of the law, that they, as Berkowitz and Lutterman put it, are "socially responsible."<sup>55</sup> That the acts of which they disapprove are legally condemned may lull critics into a state of quiescence and relatively passive regime support; or it may act positively to increase levels of trust, support and efficacy by assuring citizens that at least some of their complaints are being dealt with. Paradoxically the criminal statute (and associated enforcement effort) which condemns a particular form of behavior may have a greater suppressant or support-inducing effect on its "sponsors" than on its intended objects.

Joseph Gusfield noted the importance of the law as a device by which those needing reassurance about their own values stigmatized the values of others. He argued that Prohibition, while it may not have controlled the consumption of alcohol, did allow rural Protestant America to stigmatize urban immigrants and Catholics who, because of their greater affinity for alcohol, could be labeled less worthy.<sup>56</sup> Much the same sentiment was expressed earlier by Thurman Arnold:

Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.<sup>57</sup>

The imposition of criminal sanctions upon those who not only violate certain norms but oppose them as well, may constitute severe political repression. But the toleration of systematic evasion of such laws by the deviant subcultures they are designed to suppress, while dominant groups continue to proclaim their virtue, may in fact be a far more subtle and effective, if unintended, weapon for achieving order and stability in a multicultural or multiclass society. Conflict between groups is reduced to tolerable levels when each group obtains some measure of satisfaction. Those who oppose the behavior in question receive symbolic reassurance that they are right and additional satisfaction from believing that deviants are suffering the consequences. At the same time, the practicalities of law enforcement, including the gap in values between those who support a law and those who enforce it, and the protections of due process rules, allows the controversial behavior to continue relatively uninhibited. Direct contact between the groups is minimized. Because the law is under-enforced deviants receive some assurance that their values or conduct are not entirely illegitimate. In Gusfield's words:

Conflict between the two groups is thus minimized. The existence of divergent and potentially conflicting cultures "does not necessarily constitute any particular problem for the society as a whole so long as the two groups are not in direct interaction and do not directly confront one another's differing orientations."<sup>58</sup>

Conversely, where systematic evasion of such norms is not tolerated, and where important resources are directed to full enforcement, conflict may be exacerbated. The risks of promoting alienation through enforcement or non-enforcement, must be balanced against the possibility that use of the criminal sanction will actually narrow the moral gaps between groups.

Systematic evasion is particularly useful in reducing conflict where open political compromise is difficult or impossible to obtain, as is frequently the case where there is conflict over fundamental values. Compromise is much less difficult where there is conflict over material goods which can be translated into monetary terms and are inherently more susceptible to bargaining.

Gusfield points to another phenomenon: relabeling a particular deviant act to make it more acceptable to the group opposing it. The nation is already prone to use euphemisms in commercial and political discourse. Drug users can be labeled "sick" rather than "evil." The moral dimensions of prostitution, abortion, and excessive use of alcohol are absorbed into the concern over health. The offender becomes the object of solicitude rather than punishment. The acts or values remain unacceptable, but concern shifts to the personal or social forces which brought the acts about. Treatment becomes the appropriate response, although deviants who are "treated" may in fact be dealt with more harshly than those who are "punished." More important, relabeling can often succeed in depoliticizing the



acts, or the motivations of the actors. The drug offender is the best example. By labeling him as sick, use of drugs as a means of political protest is obscured. His flaunting of disobedience to the law and his rejection of prevailing norms, need not be considered as part of an aggregate form of deviance, but as an individual, and less threatening, form.<sup>59</sup>

Relabeling, of course, can also be applied to governmental acts or policies, which become "sick" or evil, or repressive, or fascist, or the like. Such labels rationalize withdrawal of support--perhaps even the commission of unlawful acts.

Relabeling is less effective against acts of open political dissidence. For one thing the threat to dominant interests may be perceived as more direct, and compromise less practicable. Where the possibility of conversion is low, the appropriate response may be to deal harshly. Formal political re-education is always a possibility and is openly practiced in some countries. But it is doubtful that political deviance can be effectively eliminated or curtailed in this way in a nontotalitarian society, apart, perhaps, from surface recantations under threat of sanction. Individuals may conform but ideas are more difficult to suppress. A more common approach is to place greater emphasis on inculcating and socializing others in the population to the desired values, and devising conformity rituals such as loyalty oaths. The need to stigmatize political dissidence often diminishes as events which caused it fade into history or as the dominant ideology absorbs--and thus legitimizes--what once was the radical's creed.

Groups--or values--which are not openly in defiance of the law or in opposition to prevailing values but which are nonetheless considered as potential threats to order and authority, are difficult to deal with. The

difficulty is compounded when what is threatening in the action of such groups is the claim that, as applied to themselves, society and the government have failed to live up to their own ideals. Here the strategy and tactics must be considerably more subtle. It is simply impossible to "explain" or accept the disparity between rich and poor, or black and white, without admitting contradictions between the ideal and reality. One typical response is to attack the methods by which such groups seek a redress of their grievances as contrary to other fundamental values, e.g., poverty or racism should be eliminated but not by civil disobedience. Another response is to undercut the worthiness of members of such groups, for example, by distinguishing between the "deserving" and the "undeserving" poor, or by exposing leaders of such groups as immoral, unethical, or power-hungry. Finally, a less acceptable but still utilized alternative is to challenge the legitimacy of a group's aspirations, by asserting that its leaders (almost never its rank and file members) have been taken in by, or more explicitly are servants of, a foreign ideology or some other sinister conspiracy to subvert the established order.

The criminalization of morals offenses--with or without toleration of norm evasion--relabeling, political surveillance and harassment, and conformity rituals are among the less open and more indirect methods of dealing with political dissidence, or with conditions of group conflict that have some potential for causing disorder and eroding support of the regime. Beyond these, there always lies the possibility of resort to more formal legal actions, including political trials. Use of such tactics will vary according to whether the threat consists of (a) a deliberate political crime, such as espionage or sedition, (b) politically motivated violations

of essentially nonpolitical criminal laws, and (c) other threatening conditions including the existence of dissident groups, or their activities, or those of highly visible individual dissidents.

Balbus suggests that resort to formal law has both advantages and disadvantages.<sup>60</sup> Short-run threats are best dealt with less formally, outside the official framework of legally prescribed remedies. Many have noted the dilemma inherent in efforts to enforce both law and order. More serious threats, particularly if they fall into categories (a) and (b), may provoke "legal" responses. There are advantages to the government in following ordinary legal procedures and, perhaps even more important, in depicting the threatening actions as ordinary crimes without political motives. "Criminalizing" an act immediately deprives it of some legitimacy. The government gains tactical advantages when it forces those who committed certain acts to defend themselves in an arena chosen by the government. This is especially true where the procedural rules to be applied (e.g., the rules of evidence, and legal definitions of the crimes), serve to focus attention on facts, and turn attention away from the political justifications which may have motivated its commission. Thus, in the conspiracy trial of Dr. Spock, the defense was prohibited from arguing the illegality of the war in Vietnam. The charge was conspiracy to obstruct the draft. The evidence consisted of showing certain otherwise legal acts by Dr. Spock and his co-conspirators--speeches and the delivery of surrendered registration certificates to the Department of Justice--which amounted to such obstruction. The judge decided, that, as a matter of law, the alleged (and admitted) acts constituted a crime. The jury was left only to decide if the defendants had done what they said they had done--and it so decided.<sup>61</sup> The conviction was later overturned on appeal,<sup>62</sup> but the case aptly

illustrates the point that the most successful political prosecutions are those which are ostensibly least political. Formally, there are few political crimes in American law, but it is almost always to the interest of defendants to claim that their prosecution is politically motivated.<sup>63</sup>

We have argued that often it is to the government's advantage to treat political dissidence as ordinary crime, clothed, as Balbus notes, in the language and procedures of formal rationality.<sup>64</sup> Yet there are also risks. Losing political cases, or enough of them, may result in a long-run withdrawal of legitimacy both from the government and from the legal system. The government must decide if this risk is worth the achievement of shorter-run goals. Use of the courts to control political dissidence is undoubtedly inefficient--costly and time consuming. Yet its advantages as a strategy often outweigh its disadvantages. Recourse to the courts also gives dissidents an unparalleled forum for advancing their own views and exposing what they regard as the corruptness of the government. Legitimacy is a critical political resource--for both sides--and its enhancement or preservation is an important strategic consideration.

### III

Political justice is a specialized form of social control. Like other forms of social control the dimensions and frequency of its occurrence reflect certain key features of the society--its commitment to the use of the law, or legal forms, in social control, its definition of justice and other norms which may limit government action, the degree of dissensus and the perceived relationship between dissensus and legitimacy, and the availability and efficacy of other, perhaps less costly, strategies. Political justice is not an isolated phenomenon and cannot be understood apart from

its cultural milieu. We have suggested that it is usually a residual strategy called into being to supplant or reinforce more routine strategies of social control.

There are many other strategies or devices of social control. Two in particular require mention, as especially relevant to an understanding of political justice. In a liberal, pluralist society, stability and order depend on involving citizens in activities which promote their stake in, and allegiance to, the dominant regime. The unarticulated premise is that such activities should absorb their interests and divert their attention from government. Duverger has suggested that depoliticizing events favors the established order.<sup>65</sup> And Kornhauser has noted how an overlapping group structure tends to keep people absorbed in nonpolitical activities.<sup>66</sup> But not all involvement is order producing or allegiance reinforcing. The legitimacy of group action makes groups a useful device and focus for dissident activity. The group's very existence becomes a potential source of conflict which may threaten the regime. In such situations, where a primary mechanism of control and order has failed, alternatives will be sought. Political justice provides a major option in such circumstances because it helps to break down political deviance of groups into individual transgressions, which are then punished by law; this gives government a controlled, manageable, yet potentially effective, response.

Social control is also promoted by widespread dissemination of norms such as justice, equality, and legality which imply that under certain circumstances government will protect its citizens, grant them benefits, and recognize their basic "rights." Yet, as Lawrence Friedman has observed, the interest of the government in promoting the concept of "rights" is

balanced by the need to limit excessive exercise of rights: "if everybody suddenly claimed his due the system would be gravely overloaded."<sup>67</sup> The unwillingness or inability of government to fulfill its promises would become apparent. Many "rights" conflict with each other in practice, if not in principle; others would lose value in the process of bureaucratic enforcement or distribution. Accepting as fact the proposition that all theoretically valid rights could not actually be granted or enforced, it is important to government to pursue a course of action which maximizes citizen belief in these rights but minimizes the chances that they will in fact all be claimed. One way of doing this is by promoting rights abstractly; the greater the level of abstraction at which they are recognized, the less chance they will be operationalized.

Protest movements and dissident groups are often at their most threatening, when they demand the actualization of rights. Political justice, with its reliance on legal forms, is often thought to be an appropriate strategic response. For reasons already suggested, it may also be a risky maneuver, serving only to expose the very contradictions between theory and practice which the dissident group is advertising. Both the effectiveness and the risks of political justice are dependent on the level of rights consciousness which characterizes a particular culture or society.

In a very important sense all justice is political. This impedes, though it does not deny, the possibility of efforts to isolate and understand the pervasive phenomenon of political justice in the modern democratic state. The objective of this essay was to begin the process of transforming the term from a largely subjective and pejorative concept to a tool of analysis capable, ultimately, of guiding empirical research. We have described some legal, social, and political parameters which move us

closer to a more concrete definition and a more realistic view. Yet the concept remains elusive. It remains difficult to separate political justice from mere government illegality, though we know the two are not the same. Certainly, not all injustice is the result of political justice, yet surely much of the impact of political justice is, by any standards, unjust.

Political justice may, in certain circumstances, be a force for good. It preserves the form and structure of political authority while at the same time it allows a level of conflict among competing groups and ideologies that may be, on the whole, relatively healthy. Even the passage of a criminal statute which, on its face appears repressive, must be recognized for what it often is: a compromise between those who counsel more severe measures and those who seek to decrease the repression potential of government action by subjecting it to the limits of legal process. Alan Wolfe has written that repressive political laws often follow rather than precede the demise of a target group; the law proclaims the victory (or compromise) but is not the prime generating force behind it.<sup>68</sup>

Perhaps the key to understanding political justice is the recognition that it is a pervasive phenomenon, made up of many different kinds of acts. These are usually designed to be temporary (often symbolic) solutions, rather than more permanent regulatory policies. They are most likely to occur at times of great political stress, often when a prior consensus about certain values or a heretofore stable balance of power is disintegrating. Political justice, like judicial lawmaking, is an interstitial process, which arises more out of perceived necessity than out of conviction.

## FOOTNOTES

<sup>1</sup> Many have made observations along this line, yet a more precise characterization remains elusive. This is the reciprocal of Angela Davis' distinction between ordinary crime and political crime. See Angela Y. Davis, et al., If They Come in the Morning (New York: Signet Books, 1971), p. 29. Otto Kirchheimer's classic definition of political justice is that it is "the utilization of judicial proceedings for political ends." He recognizes that courts inevitably play a political role and distinguishes political justice because of its concern with destroying the power or legitimacy of the opposition and/or building up the power of the existing authorities. See Kirchheimer, "Politics and Justice," in Burin and Shell (eds.), Politics, Law and Social Change: Selected Essays of Otto Kirchheimer (New York: Columbia University Press, 1969), p. 408.

<sup>2</sup> For a recent discussion of the strategies and consequences of conflict resolution, see Joel B. Grossman and Austin Sarat, "Courts and Conflict Resolution: Problems in the Mobilization of Adjudication," unpublished paper, 1974.

<sup>3</sup> Otto Kirchheimer, "Political Justice," in International Encyclopedia of the Social Sciences, Vol. XLL (New York: Crowell and Collier, 1968), pp. 246-248. See also Alan Wolfe, The Seamy Side of Democracy: Repression in America (New York: David McKay, 19-3), p. 208.

<sup>4</sup> Isaac D. Balbus, The Dialectics of Legal Repression: Black Rebels Before the American Criminal Courts (New York: Russell Sage Foundation, 1973), p. 1 and passim.

<sup>5</sup> See, for example, Edgar Friedenberg, "The Side Effects of the Legal Process," in Wolff (ed.), The Rule of Law (New York: Simon and Schuster, 1971), pp. 37-53. And generally see the essays in Jonathan Black (ed.), Radical Lawyers (New York: Avon, 1971).

<sup>6</sup> John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971), pp. 11-17, 30-33.

<sup>7</sup> Ibid., p. 3.

<sup>8</sup> Murray Edelman, The Symbolic Uses of Politics (Urbana: University of Illinois Press, 1964), pp. 138-142; and, generally, Politics as Symbolic Action (Chicago: Markham, 1971). Also see Jethro K. Lieberman, How the Government Breaks the Law (Baltimore: Penguin Books, 1973).

<sup>9</sup> For an interesting recent study of the phenomenon of "rule exception" and the utility of compliance, see Harrell Rodgers and Charles Bullock, Law and Social Change (New York: McGraw-Hill, 1972), pp. 182-185.



<sup>10</sup>For example, a recent study has revealed that there are 470 emergency power statutes either in force or available to the President to use at his discretion. The study further showed that the Declarations of National Emergency of 1933 and 1950 are still in force. See "Summary of Emergency Power Statutes: A Working Paper by the Special Committee on the Termination of the National Emergency," U.S. Senate, October, 1973.

<sup>11</sup>Jacobus tenBroek, Edward M. Barnhart, and Floyd M. Matson, Prejudice, War and the Constitution (Berkeley: University of California Press, 1954).

<sup>12</sup>Korematsu v. United States, 321 U.S. 760 (1944).

<sup>13</sup>United States v. United States District Court, 407 U.S. 297 (1972). Pending are congressional efforts to further tighten the limitations on governmental use of wiretaps and electronic eavesdropping. On the other hand, the Supreme Court has been less willing to inquire into the constitutionality of nonelectric snooping on the political activities of private citizens. Laird v. Tatum, 408 U.S. 1 (1972).

<sup>14</sup>Press reports of the statements of several principals charged in the Watergate burglary of Daniel Ellsberg's psychiatrist, Dr. Lewis Fielding, indicate that one defense to those charges will be that the operation was required by national security considerations.

<sup>15</sup>Op. cit., note 13.

<sup>16</sup>There are numerous studies which detail the scope of official discretion in "low-visibility" decision-making. See Jerome Skolnick, Justice Without Trial (New York: Wiley, 1966), and on the police, James Q. Wilson, Varieties of Police Behavior (New York: Atheneum, 1968).

<sup>17</sup>It is possible to conceive of politically motivated acts which are sufficiently camouflaged so as to "pass" for ordinary activities. And there undoubtedly are acts of government officials which lack this motivation and yet are widely perceived as acts of political justice. Thus there may be real differences, both theoretical and real, between the governmental and consumer perspectives.

<sup>18</sup>I have in mind here a parallel to the distinction between "overt" and "institutional" racism which is drawn by Rodgers and Bullock. Most of what has been written about political justice has tended to focus on its more "overt" manifestations; relatively little has been said about its more covert or "institutionalized" qualities. See Harrell Rodgers and Charles Bullock, Racial Equality in America: In Search of an Unfulfilled Goal (Pacific Palisades, Cal.: Goodyear Publishing Company, forthcoming), chapter 1. Also see Bertram M. Gross, "Friendly Fascism: A Model for America," I Social Policy (Nov/Dec, 1970), 44-52.

<sup>19</sup>By its very nature political justice is likely to produce ramifications--on the immediate target groups, of course, but also on the legitimacy of the regime, the attitudes of officials toward further use of similar tactics, and the adoption of alternate strategies if those initially chosen do not work.

<sup>20</sup>Our emphasis in this paper on a governmental perspective should not be read to exclude the very important role of target groups in bringing about the conditions, and, indeed, even the overt acts, of political justice, if that is to their advantage.

<sup>21</sup>Otto Kirchheimer, Political Justice (Princeton: Princeton University Press, 1961), p. 3.

<sup>22</sup>I know of no compilation yet available to support this point. But certainly the nearly universal negative result (e.g., acquittal) of recent trials involving the Black Panthers and many groups and individuals opposed to the Vietnam War suggests the validity of this observation. Political trials often generate sympathy and support for the target group--and help to publicize its goals. This point is amplified later in the paper.

<sup>23</sup>Kirchheimer, op. cit., note 21, p. 96.

<sup>24</sup>See Balbus, op. cit., note 4; "Criminal Justice in Extremis" (Chicago: American Bar Foundation, 1969); and the Report of the National Advisory Commission on Civil Disorders, Ch. 13.

<sup>25</sup>Alan Wolfe, op. cit., note 3, pp. 95-102 and passim.

<sup>26</sup>Ibid., pp. 99-100.

<sup>27</sup>Richard Rose, Governing Without Consensus: An Irish Perspective (Boston: Beacon Press, 1971), pp. 191, ff.

<sup>28</sup>Ibid., p. 113.

<sup>29</sup>Certainly the best evidence on this point comes from studies of police behavior which show that enforcing the law and maintaining order are often regarded as mutually exclusive strategic alternatives. Strict law enforcement during urban riots, when perceptions of regime legitimacy by rioters might be expected to be at a low ebb, has often been eschewed in favor of benign neglect.

<sup>30</sup>There are many examples of this relationship. Inter alia, see Kenneth Dolbeare and Joel B. Grossman, "LeRoi Jones in Newark: A Political Trial?" in Becker (ed.), Political Trials (Indianapolis: Bobbs-Merrill, 1971), pp. 227-247.

<sup>31</sup>See Edmund Cahn, "Justice," in International Encyclopedia of the Social Sciences, Vol. 8 (New York: Crowell and Collier, 1968), pp. 343-344.

<sup>32</sup>This point is especially well made by Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," unpublished paper, 1973.

<sup>33</sup>Use of the courts to solve disputes may be a double-edged sword. There are circumstances in which those with resources may take advantage of nominally neutral judicial procedures; on the other hand invoking the legal system is a classic tactic by which the "have nots" try to reduce the impact of greater resources of their adversaries.

<sup>34</sup>Due process--entirely apart from its specific meaning--is a notion of great political appeal. The current trend in the United States is to extend the concept to new groups, institutional settings, and walks of life. Thus we find variations of a due process model extended from criminal trials for adults to the juvenile courts, to processes of involuntary civil commitment, and to the internal decisions of institutions as diverse as prisons and universities (students and faculty).

<sup>35</sup>Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1964), Ch. 2. For a more extended analysis, see Robert Booth Fowler and Joel B. Grossman, "Law, Liberalism and Social Change: A Preface," unpublished paper, 1974.

<sup>36</sup>The benchmark is Judith Shklar's book, Legalism (Cambridge: Harvard University Press, 1964). For an interesting discussion of the consequences of "legalisation," see Jeffrey Jowell, "Judicial Decision-Making and Administrative Tasks," unpublished paper, 1973.

<sup>37</sup>Lon Fuller, "What the Law Schools Can Contribute to the Making of Lawyers," 1 Journal of Legal Education (1948), 204.

<sup>38</sup>See Galanter, op. cit., note 33, and Grossman and Sarat, op. cit., note 2.

<sup>39</sup>Daniel Boorstin, "The Perils of Indwelling Law," in Wolff, op. cit., note 5, p. 76.

<sup>40</sup>Harold Ofstad, "Impartiality," in Legal Essays: A Tribute to Frede Castberg (Stockholm: Scandinavian University Books, 1963), p. 135.

<sup>41</sup>Furman v. Georgia, 408 U.S. 238 (1972).

<sup>42</sup>Kenneth Davis, Discretionary Justice (Urbana: University of Illinois Press, 1971), p. 52. See also Mortimer Kadish and Sanford Kadish, Discretion to Disobey (Palo Alto: Stanford University Press, 1973).

<sup>43</sup>See generally Richard Brandt (ed.), Social Justice (Englewood Cliffs, N.J.: Prentice-Hall, 1962).

<sup>44</sup>Edelman has noted the potential reassuring and tranquilizing effect of the rhetoric of justice and equality in Politics as Symbolic Action, op. cit., note 8, p. 81. But the hypothesis that due process norms can promote regime support both positively (by increasing its legitimacy) and negatively (by absorption of interests and increasing dependency) is considerably more provocative and deserving of extensive empirical attention.

<sup>45</sup>Ibid., p. 47.

<sup>46</sup>Jack Kuykendall, "Toward a Theory of Negative Contacts," in Reasons and Kuykendall (eds.), Race, Crime and Justice (Pacific Palisades, Cal.: Goodyear Publishing Company, 1972), p. 231.

<sup>47</sup>Quoted in Barbara Tuchman, The Guns of August (New York: Macmillan, 1962), p. 355.

<sup>48</sup>Matthew Holden, Jr., "The Quality of Public Order," in Schmandt and Bloomberg, The Quality of Urban Life (Beverly Hills: Sage Publications, 1969), p. 436.

<sup>49</sup>Kirchheimer appears to make a contrary observation, but it is in reference to western societies generally, op. cit., note 3, p. 246. With regard to the contemporary United States the point seems self-evident, although I am aware of the frequently large gap between the formal definition of rights by courts and legislatures and (a) the individual perception of rights as an operative concept; and (b) the extent to which the exercise of political rights is actually protected.

<sup>50</sup>Richard Rose and William Miller, "What Are the Odds on Justice, Or, The Limits of the Law," unpublished paper, 1972, p. 5.

<sup>51</sup>Ibid.

<sup>52</sup>Distinctions of social class do not come into play in the official definition of such crimes, but frequently do affect how and against whom they are enforced. The impossibility of equal enforcement is one of the main arguments in favor of decriminalization. See Edwin Schur, Crimes Without Victims (Englewood Cliffs, N.J.: Prentice-Hall, 1965); and Dallin Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 University of Chicago Law Review (1970), 665-757.

<sup>53</sup>President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: U.S. Government Printing Office, 1967), p. 50.

<sup>54</sup>Francis Allen, The Borderland of Criminal Justice (Chicago: University of Chicago Press, 1964), pp. 25-41.

<sup>55</sup>Leonard Berkowitz and Kenneth G. Lutterman, "The Traditional Socially Responsible Personality," 32 Public Opinion Quarterly (1968), 169-185.

<sup>56</sup>Joseph Gusfield, Symbolic Crusade (Urbana: University of Illinois Press, 1963), pp. 122-126 and passim.

<sup>57</sup>Thurman Arnold, The Symbols of Government (New Haven: Yale University Press, 1935), p. 160.

<sup>58</sup>Gusfield, op. cit., note 60, p. 115.

<sup>59</sup>Joseph Gusfield, "Moral Passage: The Symbolic Process in Public Designations of Deviance," 15 Social Problems (1967), 175-188.

<sup>60</sup>Balbus, op. cit., note 4, p. 3.

<sup>61</sup>Jessica Mitford, The Trial of Dr. Spock (New York: Knopf, 1969), pp. 195-201.

<sup>62</sup>Spock v. United States, 416 F 2d. 165 (1969).

<sup>63</sup>The crime of treason, defined by the Constitution, is an exception. So too, possibly, are those crimes which penalize acts which could only be crimes if directed towards, or committed against, the government, e.g., directly advocating the overthrow of the government by force and violence, or obstruction of the draft. Most crimes with political motives are, however, treated by the government as nonpolitical; the political motivations of the defendants are normally not allowed to be argued as a justification for illegal acts. Obviously, the interests of the government in denoting an act as an ordinary criminal offense may clash with the motivations of the defendants in labeling the act as political. It might even be argued that all crimes are political, though not perhaps in the explicit or articulated motivations of the criminal. Certainly it would be difficult to ignore the political component in crimes committed in the context of social adversity, e.g., in the urban ghetto or out of despair because of economic depression.

<sup>64</sup>Balbus, op. cit., note 4, pp. 7-15.

<sup>65</sup> Maurice Duverger, The Study of Politics (New York: Crowell, 1972), p. 253 and passim.

<sup>66</sup> William Kornhauser, The Politics of Mass Society (New York: Free Press, 1959), p. 64 and passim. See also Jack L. Walker, "A Critique of the Elitist Theory of Democracy," 60 American Political Science Review (1966), 285-295; Peter Bachrach, The Theory of Democratic Elitism: A Critique (Boston: Little, Brown, 1967); and Theodore Lowi, The End of Liberalism (New York: Norton, 1969).

<sup>67</sup> Lawrence Friedman, "The Idea of Right as a Social and Legal Concept," 27 Journal of Social Issues (1971), 189-198.

<sup>68</sup> Wolfe, op. cit., note 3, p. 214. Kirchheimer seems to make the same point which, among other things, expresses the paradox that political justice may work best against relatively weak opposition groups.