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

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

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

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

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

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

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

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

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

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

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

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

4. P. 299.

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

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

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

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

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

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

7. P. 233.

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

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

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

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

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