Archetypal Trials and the Management of Dissent: Some Insights from Marketing Theory

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Recent marketing theory uses the Jungian concept of the archetype to design strategies for the improvement of product selling. Mark and Pearson propose that archetypes such as the ruler, the hero, the outlaw, and the sage are useful in promoting a product. This article suggests that the concept of archetypes as well as myths such as the Prometheus myth and the myth of the expulsion from Paradise, when combined with the insights offered by Mark and Pearson, may help in understanding the management of trials of dissent as well. The article presents seven motifs that recur in trials of dissent and shows how they form a part of the phenomenon of the political management of dissent: (1) the demonization and otherization of defendants and their supporters; (2) the tendency to employ the charge of conspiracy and thus target a group rather than a single individual; (3) the bending of the laws of procedure; (4) the utilization of previously-untested substantive charges; (5) the appeal made by each side to an external principle or vision — typically, the government resorts to the law of necessity whereas the defense resorts to natural law or a vision of "true justice" (to counter the corrupt justice currently administered by those in power); (6) focus on the judge as manipulator of laws; and (7) the appellate court assuming the role of the ultimate sage, performing its task with balance and detachment. The appellate court may use softer rhetoric in an effort to minimize the damage to the appearance

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of legality. When it does so, the rule of law is reaffirmed as a concept that benefits all sides; there is thus unity in the commitment to the rule of law, not to patriotism or to identification with the government. In addition, an effort is made to reaffirm the maxim (myth) that the government is a government of law, not of men.

> [W]e all need to develop products that actually do what they promise. However, in the meaning arena, the placebo effect is important because the meaning itself can have a positive effect on a consumer.[1]

I. ARCHETYPES AND THE MANAGEMENT OF MEANING

Is it possible that when a state (any state) puts dissenters on trial, it is managing the meaning of government? Do insights from marketing theory have anything to contribute to the dynamics of the prosecution of dissent? How do the concepts of the archetype and the myth shed light on trials of dissenters? In their book *The Hero and the Outlaw*,[2] Margaret Mark and Carol S. Pearson, two marketing and management consultants, explore archetypes and myths with the purpose of teaching advertisers how to sell more. They present a gallery of archetypes, including "the caregiver, the ruler, the regular guy/gal, the hero, the outlaw, the innocent, the sage,"[3] and urge marketers to adhere to the particular archetype hidden in the given product. They advise that "[t]he best archetypal brands are — first and foremost — archetypal *products*, created to fulfill and embody fundamental human needs."[4]

Consider a society stricken by a crisis of some sort, engulfed in actual war or in a war on crime or in a divisive conflict concerning the role of religion in public life. The public is restless. Certain people harshly criticize the government, accusing it of pursuing the wrong path, of wreaking calamity upon society. Consider now the government's reaction to this criticism. It is indignant and feels that it is representing the good guys and that the dissenters, whether inadvertently or intentionally, are either aiding some external enemy or else pouring oil onto an already burning fire. The government theorizes that the supposedly innocent members of

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1 Margaret Mark & Carol S. Pearson, The Hero and the Outlaw 23 (2001).

2 *Id.*

3 Completing this gallery but not directly relevant to our discussion are "the creator, the jester, the lover, the magician, the explorer." *Id.* at 13, fig. 1.1.

4 *Id.* at 25.

society, particularly the young and the impressionable, may fall prey to the beguiling rhetoric of the shrewd dissenters. It knows that a hesitant or ambivalent public casts doubts upon the government's legitimacy, that rallying the troops around the flag and government policy is an imperative for pursuing the government's objectives and winning the war.[5]

Thus a morality plot unfolds. A criminal trial is initiated. The prosecution, as the agent of the government, asserts that the dissenters seek to destabilize the government, perhaps overthrow it, and will thereby throw society into chaos. It suggests that a conspiracy is in the works, that an invisible yet real chain of cause and effect has been set in motion: the verbal attack by the dissenters of the government is aimed at bringing about criminal action. Thus, the prosecution claims, this verbal activity must be punished and eliminated; otherwise harmful effects will, in all probability, follow, to the detriment of all.

Let us return to marketing theory. From the perspective of marketing theory, there is no difference between the government's decision to prosecute dissenters and McDonald's decision to market the Happy Meal. Both are concerned with marketing their respective products as successfully as possible. Mark and Pearson would argue that the government is the archetypal ruler and the dissenters the archetypal outlaws. The archetypal ruler, according to Mark and Pearson, "knows that the best thing to do to avoid chaos is to take control. While Innocents [members of society] assume that others will protect them, the Ruler has no such faith. Gaining and maintaining power is therefore a primary motivation."[6] The archetypal outlaw

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5 For an interesting analysis of societies in crisis, see Erich Goode & Nachman Ben-Yehuda, Moral Panics, The Social Construction of Deviance 31 (1994):

> The moral panic ... is characterized by the feeling, held by a substantial number of members of a given society, that evildoers pose a threat to the society and to the moral order as a consequence of their behavior and, therefore, "something should be done" about them and their behavior. A major focus of the "something" typically entails strengthening the social control apparatus of the society — tougher or renewed rules, more intense public hostility and condemnation, more laws, longer sentences, more police, more arrests, and more prison cells.

See also Orit Kamir, Every Breath You Take, Stalking Narratives and the Law 5-12 (2001).

6 Mark & Pearson, *supra* note 1, at 244. The attributes of the Ruler according to these theorists are "Desire: control; Goal: create a prosperous, successful family, company, or community; Strategy: exert control; Fear: chaos, being overthrown; Trap: being bossy, authoritarian; Gift: responsibility, leadership." *Id.* at 245. Marketing theory points to IBM, the Cadillac, and the White House as "ruler brands." *Id.* at 244.

in contrast represents "the enticement of forbidden fruit":[7] she typically finds her "identity outside the current social structure, [and is] faithful to deeper, truer values than the prevailing ones."[8] Outlaws may be "alienated, angry, and willing to victimize others to get what they want,"[9] but they may also appear in a positive form, as seeking to speak the truth to power.[10]

The government, as we know, dons multiple hats. Not only is it a ruler, in Mark and Pearson terminology, it is also a caregiver. The ultimate archetypal caregiver, say Mark and Pearson, is "God as the loving father that cares for His children."[11] King, president, prime minister, and even attorney general are, therefore, reasonable substitutes for the archetypal caregiver. The caregiver "fears instability and difficulty not so much for him- or herself, but for their impact on people who are less fortunate or resilient."[12] The caregiver may thus prosecute, in our hypothetical, out of concern for the ordinary citizens who might intoxicated by the outlaw's enticing rhetoric and promises. Or she may act in order to reassure the majority that the few dissenting voices are misguided and that the government is working to contend with those voices. If the government is successful in securing a conviction and in simultaneously persuading public opinion that a great danger has been averted, it may then don the hat of hero. The archetypal hero, according to Mark and Pearson, typically "triumphs over evil, adversity, or a major challenge, and in so doing, inspires us all."[13] By successfully fighting the outlaw and averting the calamity the outlaw was planning, the government acquires the aura of being society's savior.[14] Yet the government is taking a risk. If the prosecution fails to convict, the hero's hat may pass to the

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7 *Id.* at 123.

8 *Id.*

9 *Id.*

10 Mark and Pearson continue on to classify "the participants in the civil rights and antiwar movement in the United States" as falling under the model of the archetypal outlaw, people who "changed the world to the one we know today." *Id.*

11 *Id.* at 209.

12 *Id.* at 210. The attributes of the caregiver are "Desire: protect people from harm; Goal: to help others; Fear: selfishness, ingratitude; Strategy: do things for others; Trap: martyrdom of self, entrapment of others; Gift: compassion, generosity." Typical brands falling into this category are Campbell Soup, the Volvo, and General Electric products (captured by the slogan "GE — we bring good things to life."), *id.* at 213, 218, 219-20.

13 *Id.* at 105.

14 *Id.* The attributes of the archetypal hero are

> Desire: prove one's worth through courageous and difficult action; Goal: exert mastery in a way that improves the world. Fear: Weakness, vulnerability, "wimping out". Strategy: become as strong, competent, and powerful as you are

defendants-dissenters and the government might find itself tainted with the stain of outlaw. To a certain extent, the depiction of the government as hero or outlaw is determined by those resolving the dispute between the ruler (the government) and the original outlaw (the dissenters): namely, the courts.[15]

The courts, demystified as judges, also appear in the Mark and Pearson gallery of archetypes. The judge closely resembles Mark and Pearson's description of a sage. The archetypal sage seeks "to sort out truth from illusion and the paranoia that can result when the answer is not clear or easy to find."[16] Sages aspire to "be free to think for themselves and to hold their own opinions," which approximates the judicial ideal of detachment and impartiality.[17] Typically, a judge is master of the process of the search for truth; within the framework of a basic morality tale, she is in charge of administering justice. A judge can impartially apply the rules of criminal procedure, conduct a fair trial, and even end up upholding freedom of expression and protecting the dissenting defendant's liberty. The judge then becomes a hero and will be commemorated in history as the defender of freedom and democracy. Justices Oliver W. Holmes and Louis D. Brandeis are considered just such American heroes. The justifications they developed for freedom of speech were developed even before American society was prepared to tolerate dissent.[18] However, the judge may be stripped of her role as sage and, along with the government, acquire some of the attributes of the outlaw in the eyes of society. This can happen when the judge is so clearly devoid of impartiality and detachment as to become identifiable with

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capable of being. Trap: arrogance, developing a need for there always to be an enemy; Gifts: competence and courage.

Id. at 106. Typical brands from this category are the U.S. Marines, Federal Express, and the Red Cross.

15 If the particular legal system relies on a jury for conviction, then the archetypal "ordinary guy/gal" and the archetypal "innocent" reappear during the trial as an element in the final decision-making process.

16 *Id.* at 88.

17 *Id.* at 89. The attributes of the sage are "Core desire: the discovery of truth; Goal: to use intelligence and analysis to understand the world; Greatest fear: being duped. Misled; ignorance; Strategy: seek out information and knowledge; become self-reflective and understand thinking processes. Trap: can study issues forever and never act; gift: Wisdom, intelligence." Typical brands from this category include Oprah Winfrey, Walter Cronkite, and Harvard University.

18 However, one should remember that while developing their soaring theories, these two eminent jurists did allow suppression. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (affirming the conviction); Whitney v. California, 274 U.S. 357 (1927) (where Brandeis' eloquent defense of freedom of expression did not prevent him from concurring in sustaining the conviction of Ms. Whitney).

the government. Thus, she will enter history as someone who sealed injustice at a particular difficult moment in the nation's past.

The concept of the archetype is intimately connected to the concept of the myth, and myth can play a significant role in the archetypal trial. For example, the Chicago Conspiracy Trial,[19] which was conducted from September 1969 to March 1970, was a defining moment in the struggle between conservatism and liberalism in the United States.[20] In 1968, President Johnson, architect of the federal civil rights legislation and the Great Society and commander-in-chief of the war in Vietnam, declared that he would not run for a second term as President. The contentious Democratic Party convention later that summer was accompanied by violent rioting. Richard M. Nixon, champion of law and order and self-appointed spokesman of the "silent majority" (as opposed to the "vocal minority"),[21] was elected President. As soon as the Nixon Administration took power, the Justice Department put leaders of the late 1960s protest movements on trial: the movement to end the war in Vietnam ("MOBE"), the counterculture (the Yippies), the Black Panthers (representing black power), and the student movement associated with the unrest in the universities.[22] Fighting chaos and defending the silent majority gave the government the roles of ruler and caregiver respectively. In contrast, Mark and Pearson suggest that members of the protest movements fall into the category of the archetypal outlaw who reshapes society and thereby becomes some sort of hero.[23]

One scene at the Chicago Conspiracy Trial, the binding and gagging of Bobby Seale,[24] was eerily reminiscent of the Prometheus myth.[25] The

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19 United States v. Dellinger, 472 F.2d 340, 370 (7th Cir. 1972).

20 Jason Epstein, The Great Conspiracy Trial 260 (1970); *see also* John Shultz, Motion Will Be Denied (1972); Pnina Lahav, *The Chicago Conspiracy Trial: Character & Judicial Discretion*, 71 U. Colo. L. Rev. 1327, 1330 (2000).

21 Nixon coined this phrase in 1969 in his address to the nation on the war in Vietnam. President's Address to the Nation on the War in Vietnam, Pub. Papers: Richard Nixon, 1969, at 909 (1971) ("And so tonight — to you the great silent majority of my fellow Americans — I ask for your support.").

22 Defendants at the trial were: David Dellinger, Rennie Davies, Tom Hayden, Abbie Hoffman, Jerry Rubin, John Froines, Lee Weiner, and Bobby Seale.

23 Mark & Pearson, *supra* note 1.

24 Bobby Seale was the eighth defendant in the trial. Judge Hoffman's order to have him bound and gagged was linked to the judge's effort to avoid severing his trial. After three days of binding and gagging and public uproar, Seale's trial was severed and the Chicago Eight became the Chicago Seven.

25 As well as of the binding of Isaac to the sacrificial altar and the crucifixion of Christ, but for purposes of brevity, I shall dwell only on Prometheus.

similarity begins with the act of binding and continues to the underlying fact pattern. In both cases, the fettered protagonist is Janus-faced: a dangerous outlaw in the eyes of the authorities and a defiant hero in the eyes of the oppressed. Prometheus, a Greek Titan, gave fire, or light (enlightenment), to the human race. As punishment, Zeus had him chained and sent an eagle to eat his immortal liver, which constantly replenished itself. Bobby Seale, Chairman of the Black Panther Party for Self-Defense, agitated for substantive equality to African-Americans. In the cases of both Prometheus and Seale, the binding was carried out in public, thereby inflicting pain and humiliation on the bound protagonists and their followers. Both cases bear a moral lesson.

In the Prometheus myth, Zeus is lawmaker, judge, and executor of the punishment. At his disposal is Might, a figure who dutifully follows orders and supervises the execution of the verdict.[26] In this myth, the gods are driven by the fear that chaos might ensue should humans be armed with the weapon of knowledge (fire). In Seale's binding and gagging scene, the collaboration between judge and police is visibly played out in the open courtroom as Judge Julius Jennings Hoffman orders the marshals to execute the binding and gagging. The Chicago Conspiracy Trial was based upon charges that the defendants had intended to incite riots (fire and chaos) in Chicago during the Democratic National Convention in 1968.

Bobby Seale was bound and gagged because he insisted on representing himself at trial. Seale considered himself to be defending his constitutional right to be represented by counsel of his choice.[27] When he was ignored by the judge, he escalated his protest and delivered an insulting and vulgar speech. Judge Hoffman perceived Seale's attempts as gross disruptions of order (a repetition of the chaos in Chicago), the order necessary for a trial to proceed and justice to be administered.

The more I reflect on the similarities between the Promethean myth and the Seale trial scene, the more I study the Chicago Conspiracy Trial, and the more I examine other trials from the array of trials of dissenters, the more I see common features: the yearning for order and the dread of chaos; the fear that "a single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration";[28] the charge of conspiracy to undermine the system; the blurred line between judge and prosecutor; the insistence of the defendant that justice is being violated.

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26 1 Aeschylus, Prometheus Bound, The Complete Greek Tragedies 311(David Grene & Richmond Lattimore eds., 1953).

27 Lahav, *supra* note 20.

28 Gitlow v. New York, 268 U.S. 652, 669 (1925) (majority opinion defending the supression of speech).

We can see in the legal phenomenon of dissent trials the reenactment of the powerful mythic theme and the appearance, again and again, of archetypal figures claiming justice, denouncing corruption, insisting on order, warning against conspiracy, and claiming to hold the moral high ground.

Marketing theory is not alone in observing the significance of the archetypal in day-to-day life. Archetypes are woven into literature and poetry and have long been identified as crucial for understanding the human subconscious.[29] In his *Four Essays on Criticism*, literary critic Northrop Frye defines the archetypal as "a typical or recurring image ... a symbol that connects one poem with another and thereby helps to unify and integrate our literary experience." He observes that "archetypal criticism is primarily concerned with literature as a social fact and as a mode of communications ... by the study of conventions and genres; it attempts to fit poems into the body of poetry as a whole."[30] If we substitute "poem" with "trial" and "the literary experience" with "the legal experience," we can consider whether trials of so-called political troublemakers of all sorts and types and from different cultures and historical periods constitute such "communicable units," which unify and integrate the universal legal experience.[31]

The combination of Mark and Pearson's marketing theory of archetypes with the idea of the recurring myth may yield some intriguing insights. The management of meaning need not be vulgar or cynical. When the government initiates the prosecution/persecution of dissent, it may be acting out of the earnest conviction that it is serving the public interest. It may be concerned for the country's stability; it may be genuinely convinced that actual harm will ensue if the political agitation is allowed to continue. As a political creature, it may also aim to crush dissent before public

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29 *See generally* Carl G. Jung, Psyche and Symbol (1991).

30 Northrop Frye, Anatomy of Criticism: Four Essays 99 (1957). For a brilliant application of the idea of recurring themes to trials, see Shoshana Felman, *Of Judicial Blindness, Or the Evidence of What Cannot Be Seen*, 23 Critic. Inq. 738 (1997).

31 The etymology of the term archetype may help clarify this inquiry. The term archetype contains two elements: *Arche* signifies "beginning, origin, cause, primal source and principle," but also "position of a leader, supreme rule and government." *Type* signifies "form, image, copy prototypes, model, order and norm." Together these concepts denote two interactive conditions. First, the term denotes "the process of imprinting" through continually recurring typical experiences. Second, archetype denotes the "forces" and "tendencies" "which lead empirically to a repetition of similar experiences and forms." Paul Schmitt, Archetypisches bei Augustin und Goethe (1945), *quoted in* Jolande Jacobi, Complex/Arcehtype/Symbol 48-49 (Ralph Manheim trans., 1959).

opinion turns against the government; that is, it may act for the purpose of preserving its power. It may be blurring the line between partisan interests and the public good.[32] In the course of so doing, the government may identify itself albeit not necessarily consciously (unless its advisors are trained in some variant of marketing theory[33]) with the archetypal characters of ruler, caregiver, hero, and sage. At the same time, it may also (and quite unconsciously) be reenacting the myth of Prometheus. When this happens, the management of meaning yields results that are completely opposite from those sought by the managers: the government ends up being cast in the archetypal role of outlaw and the dissenter transforms from outlaw into hero.

Put differently, the reenactment of the myth activates what Jung called "the shadow," revealing its dialectic dark side, which is generally hidden from the public consciousness.[34] Under Mark and Pearson's theory, the shadow is referred to as the "trap" waiting in lie for the archetype.[35] For example, the trap set for rulers is that they will become authoritarian. Similarly, the caregiver may engage in a "martyrdom of self" and an "entrapment of others," and the hero may display "arrogance, developing a need for there always to be an enemy."[36]

In this paper, I propose treating the archetype-laden dissent trial as a legal process where certain motifs or themes reappear on the historical and legal landscape and the participants' behavior closely approaches that of archetypes. The work I have done so far is rather preliminary and I postpone a fully developed theory for a later stage. However, as an initial step, I have identified a set of seven (in itself a number with mythical connotations) perennial motifs in such trials. Not all of the elements listed below appear in every dissent trial, nor do I claim the list to be exhaustive. But all these elements are sufficiently common to merit discussion:

1. Demonization and otherization of defendants and their supporters.
2. Tendency to employ the charge of conspiracy and thus target a group rather than a single individual.

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32 At the time of the writing of this article, the United States was preparing to go to war with Iraq. A memorandum written by Secretary of Defense Donald H. Rumsfeld is reported to state: "If public support is weak at the outset, U.S. leadership must be willing to invest the political capital to marshal support to sustain the effort for whatever period of time may be required." *Rumsfeld Favors Forceful Actions To Foil An Attack*, N.Y. Times, Oct. 14, 2002, at A9.

33 Which, in political theory, generally falls into the Machiavellian school of thought.

34 Jung, *supra* note 29, at 8-10.

35 *Supra* notes 6, 12, 14, 17.

36 *Id.*

3. Bending the laws of procedure.
4. Utilization of previously-untested substantive charges.
5. Each side appealing to an external principle or vision: typically, the government resorts to the law of necessity whereas the defense resorts to natural law or a vision of "true justice" (to counter the corrupt justice currently administered by those in power).
6. Focus on the judge as manipulator of laws.
7. The appellate court as the institution required to maintain balance and detachment. These courts may use softer rhetoric in an effort to minimize the damage to the appearance of legality. When this happens, the rule of law is reaffirmed as a concept that benefits all sides; there is thus unity in the commitment to the rule of law, not to patriotism or identification with the government. In addition, an effort is made to reaffirm the maxim (myth) that the government is a government of law, not of men.[37]

II. THE DEMONIZATION OF THE DEFENDANTS AND THEIR FOLLOWERS

One purpose of a trial of dissent is to demonize the defendants and solidify and reinforce in the public's mind the "fact" that they were planning to subject society to a "parade of horribles" that could only result in chaos and disorder.[38]

We can begin with the mythical story of Adam and Eve in the Garden of Eden. The conventional reading of Genesis ignores the question of whether a trial took place before the three "delinquents" were exiled from Paradise. Similar to what transpires in the Prometheus myth, God fills the roles of lawmaker, judge, and executioner.

In exploring the theme of demonization, I will focus on the serpent. The serpent is first presented as a resident of Paradise, "the more subtil

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37 My assumption here, of course, is that the dissent is crushed and that there is no change in regime (in which case, the erstwhile defenders would put the previous rulers on trial), but at the same time the political system adjusts and attempts to heal the political wounds within the framework of continuity and reconciliation.

38 In most trials of dissent, the government does not consciously decide to demonize the defendant for the purpose of solidifying public opinion. The demonization through a parade of horribles is usually more of a subconscious attempt on the government's part, or it is rephrased as the government's responsibility, in the process of protecting society, to reveal to society the danger posed by the defendant. The most blatant examples of defendant demonization to secure public

than any beast of the field which the Lord God had made."[39] What is his role in the greatest debacle of human history, which ended with humankind's banishment from the most utopian of utopias? The serpent plays the role of political agitator, a deconstructionist, who unmasks the true reasons behind the law. When Eve tells him that the prohibition on eating the fruit of the Tree of Life and Tree of Knowledge is intended to protect them "lest ye die," the serpent challenges the explanation and offers another in its stead:

> Ye shall not surely die: For God doth know that in the day ye eat thereof, then your eyes shall be opened, and ye shall be as gods, knowing good and evil.[40]

The serpent's explanation is political: the powers that be (God) are not willing to share their knowledge with the rank and file. The *Midrash* (the Rabbinic interpretation of the Scripture) prefixes the serpent with the adjective "evil" and attributes to him the intention to overthrow God's kingdom and rule in His stead. Thus, political criticism is interpreted as concealing an underlying intention to carry out a putsch:

> What did the evil serpent think? He thought: "let me kill Adam and marry his wife and I shall rule the universe and walk with my head high and eat the world's delicacies."[41]

Following the trial of the three characters from Genesis, the serpent is demonized as the quintessential enemy of man, stealthily and consistently

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opinion against the dissenter and her opinions have been the Soviet Show Trials of the late 1940s and early 1950s, when the Soviet government engaged in a conscious manipulation of the trial forum. Under Stalin's rule, the Soviet Union used these highly publicized "trials" to solidify its control of satellite states and their communist parties. Defendants were chosen hand-picked, beaten, and interrogated until they produced confessions of anti-communist involvement; sentences were pre-determined; the trial casts were selected; and the trial scripts were memorized and rehearsed before the public trial was held for the viewing of all citizens. The central scene of these trials was the defendants' lengthy confessions, provided as an example to the larger public of what to avoid. These scripted trials were intentionally devised as a means of quieting dissent and solidifying power. *See generally* George H. Hodos, Show Trials: Stalinist Purges in Eastern Europe, 1948-1954 (1987).

39 *Genesis* 3:1.

40 *Id.* at 3:3-5.

41 Avot De-Rabi Natan 1:3 (author's translation from Hebrew).

trying to undermine order. The serpent seeks to "bruise" man's heels, thus literally causing him to fall.[42]

During the First World War, thousands of Americans were prosecuted under the 1917 Espionage Act on grounds of conspiracy to cause "insubordination and obstruction in the military and naval forces of the United States."[43] The justifying mantra of the time was "It is better to kill the serpent when it is still in the egg."[44] The logic behind this slogan was that any political speech that may be construed as tending to undermine the armed forces' commitment to following the government's orders should be outlawed before it becomes threatening action.

The case of *Ex parte Milligan*[45] recently became the focus of public attention when in the aftermath of the events of September 11, President George W. Bush announced the establishment of military tribunals. Lambdin Milligan led the opposition to President Lincoln's decision to prevent by force the secession of the Confederate states from the Union. He was tried by military tribunal in Indiana and sentenced to death. The U.S. Supreme Court (after the Civil War had ended and the Union had been restored) decided that Milligan should be set free. *Ex parte Milligan* stands for the proposition that the Commander-in-Chief cannot constitutionally charter military commissions on American soil if the civil courts are open and functioning. But there is more than that to *Ex parte Milligan*. Milligan did not stand on trial alone. The military assembled and tried five leaders of a secret society in northwest United States, known as the Sons of Liberty. The government argued that Milligan and his co-defendants had organized together with non-indicted co-conspirators to overthrow the government of the United States and give aid and comfort to its enemies, namely, the armies of the Confederacy. There is no need to review the detailed contents

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42 *Id.* at 3:15: "And I will put enmity between thee and the woman, and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise his heel."

43 Espionage Act, ch. 30, 40 Stat. 217 (1917).

44 Zacharia Chafee Jr., Free Speech in the United States 23 (2d ed. 1941) (referring to Brutus' speech in *Julius Caesar*, "[an]d therefore think him as a Serpent's egg, Which hatched, would as his kind grow mischievous; And kill him in the shell." William Shakespeare, Julius Caesar act 2, sc. 1.). See also Julia War Howe's *The Battle Hymn of the Republic*, the semi-official Civil War song for the Union army: "I have read a fiery gospel write in burnish'd rows of steel, 'as ye deal with my contemners, So with you my grade shall deal:' Let the Hero, born of woman , crush the serpent with his heel Since God is marching on." The song regained popularity following September 11, 2001.

45 71 U.S. 2 (1866).

of the six-page five-charge indictment;[46] suffice it to say that much of the indictment rested on intent and speech rather than on action. For the purposes of this discussion, I am interested only in the phenomenon of demonization. Referring to the defendants as "coward sympathizers," Benjamin F. Butler addressed the Court as follows:

> Judicial notice must be taken of the ... fact ... that if the soldiers of the United States, by their arms, had not held the state from intestine domestic foes within, and the attack of traitors leagued with such without ... there would have been no courts ... no place in which the ... Judge ... could sit in peace to administer the law.[47]

Thus the defendants in such trials are presented as outlaws, "domestic foes" who collaborate with traitors in order to destroy the government.[48] The government and the prosecution are portrayed as rulers and caregivers, as Zeus trying to maintain the *status quo ante* or God attempting to preserve the state of Paradise by exiling its corrupt inhabitants.

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46 The Milligan Case 67-73 (Samuel Klaus ed., 1929).

47 *Id.* at 211; *see also* Michael R. Belknap, Cold War Political Justice 79 (1977) (quoting the opening statement of the prosecutor in *Dennis v. United States*: "They teach that this revolution cannot be without violence ... [but] for to be successful the entire apparatus of the government must be smashed.").

48 Immediately after World War II, the French government held a series of treason trials, implicating French supporters of the Vichy Regime. During this period, the French government singled out various French citizens who had been vocal spokesmen of the Vichy Regime and the Nazi cause, shifting their classification from voices of the majority to voices of the dissent. One of the most famous of these prosecutions was the trial of Robert Brasillach in 1945. Brasillach, a French journalist before and during the German occupation, was tried for treason, evidenced through writings in his pro-Nazi newspaper and his personal poetry. The French prosecutor directed most of his energies at trial to demonizing Brasillach, rhetorically asking the court why the defendant "rich with so much talent, laden with so much success, and who could have become one of the most eminent writers of our country ... abuse[d] his gifts, his success, his authority in order to try and lead our youth, first toward a sterile politics, then towards the enemy." In addition to accusing Brasillach of personally leading astray France's youth, common rhetoric in treason and conspiracy trials, the prosecutor also repeatedly invoked homosexual symbolism in describing Brasillach's relationship with Germany, contrasting it with the sense of almost sexual violation (rape) felt by occupied and defeated (female) France. Alice Kaplan, The Collaborator 164 (2000) (Chapter XII).

III. CHARGING A GROUP WITH CONSPIRACY

Charging a group with conspiracy is intended to achieve several objectives. To begin with, a charge of conspiracy is easier to prove than a substantial charge of violation of a law.[49] Hence, in general, the prosecution resorts to this tactic when it does not have enough evidence to prove illegal action by the given group.[50] For example, in the 1949 case of *Dennis v. United States*, which involved the leadership of the American Communist Party, the Justice Department had no hard evidence of any concrete plans on the part of the

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49 Conspiracy is easier to prove than a substantive offense. First, the actual crime conspired to need not occur for a charge of conspiracy, Pereira v. United States, 347 U.S. 1, 11 (1954). Second, a conspiracy conviction can be based on circumstantial evidence, United States v. Marx, 635 F.2d 436, 439 (5th Cir. 1981). Third, the co-conspirator exception to federal hearsay rules permits prosecutors to use a co-conspirator's acts and declarations against all other co-conspirators, Fed. R. Evid. 801(d)(2)(E). Fourth, federal joinder rules allow prosecution of multiple defendants in one trial, Lutwak v. United States, 344 U.S. 604, 623 (1953) (Jackson, J., dissenting) (bemoaning prosecutors' ability to introduce evidence against one co-conspirator to the detriment of all other co-conspirators at the same trial). And finally, fifth, the government can institute a conspiracy prosecution in any jurisdiction where a conspirator committed some act in furtherance of the conspiracy, allowing forum shopping for the jurisdiction that will be least beneficial to the defendant, Krulewitch v. United States, 336 U.S. 440, 452 (1949) (Jackson, J., concurring).

Conspiracy has long evoked criticism due to the relative ease of indictment and conviction as well as prosecutorial abuse of the charge. Judge Learned Hand referred to the conspiracy charge as the "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). Likewise, Justice Jackson lamented prosecutors' "growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself" and suggested that the "loose practice of this offense [conspiracy] constitutes a serious threat to fairness in our administration of justice." *Krulewitch*, 336 U.S. at 445-46 (Jackson, J., concurring).

50 A timely example of the prosecution resorting to a charge of conspiracy because it lacks evidence of actual participation is the current case against Zacarias Moussaoui. Moussaoui has been charged for being an Al Qaeda member who conspired in the September 11th attacks. The prosecution has alleged that Moussaoui's August 16th immigration arrest prevented his actual participation in the September 11th terrorist attacks and that before his arrest, Moussaoui engaged in a series of acts similar to those engaged in by the terrorists who actually carried out the attacks. *See* Laurie P. Cohen, *Doing Justice: In Terrorism Trial, Death Penalty Debate Blazes New Ground*, Wall St. J., Mar. 20, 2002, *available at* 2002 WL-WSJ 3389145.

defendants to overthrow the government with force and violence[51] and, therefore, decided to resort to the charge of conspiracy.

From the political perspective, the charge of conspiracy strengthens the government's archetypal narrative that it is fighting sinister forces.[52] First, the fact that a number of people are involved seems proof that the danger is serious. The government is not facing a lonely pamphleteer or a single crusader. Second, the very charge of conspiracy invokes fear of a shadowy yet powerful organization, cleverly working underground to wreak some calamity upon society.[53] The covert conspirators as potential evildoers

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51 In his book *Cold War Political Justice*, Belknap argues that the *Dennis* case was not a strong one ... [b]ecause the government had no proof of serious wrongdoing by the CPUSA, in order to dramatize its own anti-communism, it had to resort to the Smith Act ... . If the Justice Department had possessed evidence that the CPUSA was plotting a revolt, it could have prosecuted the organization's leaders for seditious conspiracy.

Belknap, *supra* note 47, at 80. *But see infra* note 50 (Jackson's concurrence in *Dennis*).

52 Justice Jackson noted this effect of conspiracy charges in *Krulewitch*, explaining that the charge of conspiracy "comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself." *Krulewitch*, 336 U.S. at 440. But Jackson did uphold the conviction of the American Communist leaders on the ground of conspiracy, Dennis v. United States, 341 U.S. 494 (1951).

For an analysis of the psychological implications of conspiracy charges, see Al Katz, *A Psycho-Analytic Peek at Conspiracy*, 20 Buff. L. Rev. 239 (1970), particularly *id.* at 246, where Katz explains,

> The instinctual appeal of conspiracy means that if people are given any suggestion that a conspiracy exists their psychological matrix of expectations shifts the burden of proof to the extent of creating in their own minds a presumption in favor of the reality of such a conspiracy ... . Quite apart from the effect of this presumption on the outcome of actual litigation, it has significant political and social consequences. By employing the rhetoric of plot or conspiracy, any group ... can generate substantial apprehension, and use the anxiety thus generated to support policy decisions which might otherwise not stand up against rational argument.

53 This point was raised by the Eastern District of Michigan when it granted Rabih Haddad a new bail hearing on the ground that the judge at his initial bail hearing was prejudiced by the classification of his case as a matter of "special interest." The court explained that

> [it] is highly likely in the climate of fear the events of 9/11 precipitated, that the Government's designation of Haddad's case as a matter of "special interest" tainted the immigration judge's decision whether to release Haddad into the general public. The classification inevitably suggests a link between Haddad and the terrorists or terrorism, or more specifically the attacks of September 11.

are easily contrasted with the honorable, above-the-ground gathering of the police and army. Soldiers and policemen also "breathe together" (*conspirare*) — and are willing to sacrifice themselves — but for the noble purpose of protecting the nation.[54]

IV. BENDING THE LAWS OF PROCEDURE

A commonly recurring element in several of the trials I have examined is the peculiar laxity with which the laws of evidence and the laws of procedure are treated by the courts. Consider first the Chicago Conspiracy Trial. A cloud of infamy hung over this trial from the start, due to the court's constant violation of prevailing rules of criminal procedure. Indeed, Judge Hoffman's casual dismissal of motions by the defendants was such a frequent occurrence that one book about the trial was entitled *Motion Will Be Denied.*[55]

A good example of this disregard for criminal procedure is the jury selection process for the trial. In fact, the guilty verdict handed down in the trial court was overturned by the appellate court because the trial judge had not followed the conventional rules of jury selection and hence the defendants could not be said to have been tried by a jury of their peers. In his determination to provide for an efficient and speedy trial, Judge Hoffman failed to follow the rules designed to guarantee defendants a relatively impartial jury of their peers.[56]

Haddad v. Ashcroft, No. 02-70605, 2002 U.S. Dist. WL 31096692, at *4 (E.D. Mich. Sept. 17, 2002). While the classification of a post-September 11 immigration prosecution as a case of "special interest" does not attach an explicit charge of conspiracy to the case against the alien, nor does it involve freedom of expression, it has echoes of conspiracy allegations and thereby prejudices the defendant.

54 A soaring rendition of the solidarity of soldiers is the speech delivered by King Henry V before the battle against France was launched: "For he to-day that sheds blood with me shall be my brother." William Shakespeare, Henry V act 4, sc. iii.

55 Shultz, *supra* note 20.

56 The Seventh Circuit determined that Judge Hoffman's refusal to ask the jury certain questions proposed by the defense was contrary to his "judicial duty to do what was reasonably practicable to enable the accused to have the benefit of the right of preemptory challenge and to prevent unfairness at trial." United States v. Dellinger, 472 F.2d 340, 370 (7th Cir. 1972) (quoting Bailey v. United States, 53 F.2d 982, 984 (5th Cir. 1931)). But see the warning that during a security crisis "the protection of the jury proves illusory. As the Assistant to the Attorney General admits, 'There has been little difficulty in securing convictions from juries.'" Chafee, *supra* note 44, at 70.

The military trial of Lambdin Milligan and his co-defendants also demonstrates the laxity with which the courts treat laws of evidence and the laws of procedure in dissent trials. Upon the opening of the trial, counsels for the defendants submitted a motion to the military commission requesting the severing of the trial into separate trials for each defendant. Here is defense counsel for one of the defendants:

> It is, in my opinion, entirely without precedent in Military Courts, to put two prisoners on trial at the same time. Defendants, jointly charged, are entitled to all the benefits they can derive from separate trials. In a joint trial, the evidence introduced against one defendant might militate against another, and bear more strongly against him than if he was tried separately.[57]

This was a strong argument, especially in view of the fact that the government was seeking the death penalty. The Judge Advocate urged the Military Commission to dismiss the motion, emphasizing that the major charge was conspiracy and the evidence was applicable to all the defendants. He made a number of arguments based on expediency, including that the members of the commission were all officers who were needed on the battlefield and that he had to tend to other trials and should not be overly detained at the present trial. The Judge Advocate did concede that there was no precedent for trying a group together against the will of the individual defendants: "One of the counsel for the accused states that he has examined military books, and has not found a single case where prisoners have been jointly arraigned before a military court." But he countered this with: "I will state that in my military experience, and as Judge Advocate, I have not seen a single case that did not make precedents. This has been constantly making precedents."[58] To this argument that making new law can be justified by necessity he added a well-known (archetypal) argument: "There are the rights and privileges of the accused to be considered and also the rights and privileges of the government."[59] Arguing that the rights of the government must be considered implies that if the government's rights are not upheld, the government will be unable to prevent the threatened chaos.[60] This argument serves to personify

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57 The Milligan Case, *supra* note 46, at 254.

58 *Id.* at 257.

59 *Id.* at 255-56.

60 In times of turmoil, it is common for governments to justify the abrogation of procedural rules and other rules by referring to the pressing needs of the time. Within a month of September 11, 2001, the Chief Immigration Judge in cooperation with U.S. Attorney General Ashcroft issued an order, known as the Creppy Directive, requiring that all hearings related to cases deemed by the INS as "special interest"

the government (the government, like the defendant, has rights) in order to emphasize that "disarming" it of these rights might mean disarming the hero of his weapons, in which case the dragon threatening society might not be slain. Thus, in *Ex parte Milligan*, after some deliberation, the Military Commission rejected the defendants' motion to sever the trials, and the trial proceeded as it had commenced.[61]

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be closed to the public, press, and the defendant's family. The Creppy Directive further prohibited INS courts from even confirming or denying the existence of a certain case on the docket. (In *In re Haddad v. Ashcroft*, the Eastern District of Michigan explained that "courts have found that open hearings are fundamental to guarantee a fair hearing." 221 F. Supp. 2d 799, 803 (2002) (citing *Petcher v. Lyons*, where the court found that a judge abused his discretion in excluding the public from immigration deportation hearings by citing the need to assure the safety of the entire American people against further terrorist attacks)). The Creppy Directive orders are self-described "additional security procedures." North Jersey Media Group v. Ashcroft, 205 F. Supp. 2d 288, 301 (E.D. Mich. 2002) (citing Creppy memo attached as an exhibit to the complaint). A Justice Department spokeswoman further explained that

> opening sensitive immigration hearings could compromise the security of our nation and our ongoing investigations ... we are at war, facing a terrorist threat from unidentified foes who operate in covert ways and unknown places ... this makes it essential that the United States take every legal step possible to protect the American people from acts of terrorism.

Dan Egged, *Judge Orders Release of Open Hearings for Detainee*, Wash. Post, Sept. 18, 2002, at A14, *available at* 2002 WL 100082731. Another Justice Department spokesperson, Dan Nelson, responded to the question whether the Creppy Directive is necessary by saying "[W]e're conducting the largest investigation in United States history, and we're using all legal authority to do so." William Glaberson, *A Nation Challenged: Secret Trials: Closed Immigration Hearings Criticized as Prejudicial*, N.Y. Times, Dec. 7, 2001, at B7. While various courts, including the Sixth Circuit, reject this justification for change in the established practice at immigration hearings, it was recently accepted by the Third Circuit Court of Appeals. North Jersey Media Group, Inc. v. Ashcroft, 2002 WL 31246589 (3d Cir. Oct. 8, 2002); see also Judge Greenberg's statements at oral arguments quoted in Jim Edwards, *Appellate Watch: Challenge to Secret Deport Hearings Appears Headed to U.S. High Court*, N.J. L.J., Sept. 23, 2002 (quoting Judge Greenberg's statement: "We could make a decision here upholding this [trial ruling favoring openness] and lots of people may die. ... You want us to run that risk? ... How can we do that?").

61 > [T]he commission, after a full and careful deliberation ... has concluded that in view of the fact, that no right or rights or any of the accused, in any particular, would be prejudiced by a joint trial, it was their duty to proceed with the trial of the prisoners as they were arraigned.

The Milligan Case, *supra* note 46, at 257.

V. PREVIOUSLY-UNTESTED SUBSTANTIVE CHARGES

This archetypical element of the dissent trial is slightly more complex than the previous element (bending the laws of procedure) and involves a somewhat paradoxical phenomenon. The crux of the archetypal dissent trial is the assertion that the government has the authority to maintain order and prevent chaos. Therefore, the primordial or root substantive charge is always the same in these trials: treason. There is an explicit or implicit accusation that the defendant (or defendants) has (have) conspired to subvert the fundamental order of the state and for this reason the government is obliged to dislodge them from society.

Treason, however, appears in multiple mutations. The cases I have chosen to examine, while motivated by the intuition that treason was committed, do not rest explicitly upon the charge of treason. Rather, lesser charges are employed involving a relatively new offense hitherto barely considered by the judicial system. I first will present a few examples of the employment of such lesser charges and then will return to this paradox.

The quintessential trial raising a new charge is that of Adam, Eve, and the serpent in the Garden of Eden. God commanded Adam and Eve not to eat the fruit of the Tree of Life and Tree of Knowledge. No mention was made regarding the criminality of *reflecting* upon the underlying reasons of this commandment or of the criminality of articulating such thoughts. And yet God deemed the serpent's speech criminal subversion, without even allowing the serpent the opportunity to defend himself against the charge, in stark violation of basic principles of fairness.[62]

This line of analysis is supported by the fact that the serpent, in his speech, did not urge Eve that it was in her interest to violate God's prohibition on eating the fruit; he did not incite her to perform the prohibited act.[63] The essence of his speech was explanatory.[64] Hence, the criminalization of

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62 Again, the *Midrash* is instructive. One commentator explains that because the serpent was an "inciter," he was not entitled to the right to defend himself (or to a hearing): "God heard Adam and heard Eve. Why did he not hear the serpent? Because he said the serpent is argumentative [and will challenge me] therefore he [God] jumped and issued a verdict." Yalkout Shimony, 3 Seder Bereshit 99 (author's translation from Hebrew).

63 Consider Judge Learned Hand's narrowed definition of incitement in the *Masses* case: "If one stops short of urging upon others that it is their duty or in their interest to resist the law, it seems to me one should not be held to have attempted to cause this violation." Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).

64 And [the serpent] said to the woman, Has God said, You shall not eat any tree

his speech created a new offense that hitherto had not been part of the body of criminal law in the Garden of Eden. Similarly, Eve's seduction of Adam appears not to have been a clear violation of the existing law prior to God's declaring it to be so at the trial. These were new offenses, designed to rid Paradise of agitators questioning the rationale underlying the legal system there.

Let us progress to twentieth-century United States. *Abrams v. United States* is one of the canons of First Amendment law. Four young Jewish immigrants, Jacob Abrams, Mollie Steimer, Hyman Lachowsky, and Samuel Lipman, were charged with conspiracy *in violation of* the 1918 Espionage Act. A fifth co-conspirator, Jacob Schwartz, died in prison from ill health that was somewhat assisted by police brutality.[65] The five defendants were anarchists who had protested the Wilson Administration's decision to invade revolutionary Russia. They published and distributed circulars that denounced the "Hypocrisy of the United States and Her Allies" and called upon workers everywhere to "awake" and resist the American invasion.[66] The defendants were charged with conspiring

> when the United States was at war with the Imperial German Government, * * * unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war.[67]

> of the garden? And the woman said to the serpent, We may eat of the fruit of the trees of the garden: but of the fruit of the tree which is in the midst of the garden, God has said, you shall not eat of it, neither shall you touch it, lest you die. And the serpent said to the woman, You shall not surely die: for God knows that on the day you eat of it, then your eyes shall be open, and you shall be as gods, knowing good and evil.
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> *Genesis* 2:3-5.

65 Richard Polenberg, Fighting Faiths 88-95 (1987). Polenberg points out that while Schwartz might have been beaten in prison, the immediate cause of his death was pneumonia. Polenberg presents a riveting account of the *Abrams* case and its aftermath.

66 The Yiddish pamphlet read:

> Workers, our answer to the barbaric intervention has to be a general strike .... Workers, up to the battle! Three hundred years the Romanovs have taught us how to fight. Let all rulers remember this, from the smallest to the biggest despot, that the hand of the revolutionary will not tremble in the fight. Woe to those who stand in the way of progress! Solidarity lives. Rebels.
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> *Id.* at 54-55.

67 Abrams v. United States, 250 U.S. 616, 617 (1919).

The indictment contained two aspects that shed light on our discussion. First, the congressional statute upon which the indictment was based was new, having been passed in 1918 as an amendment to the Espionage Act of 1917.[68] Thus, the offense did not come before the courts with the customary trail of precedents that could shed light on its substantive contours and serve as guidelines for prosecutors, judges, and ordinary individuals. Second, the 1918 statute posed the problem that if the law explicitly prohibited supporting Imperial Germany but the intent of the defendants was to assist Revolutionary Russia, then their speech did not fall within the four corners of the offense.

For the purposes of our discussion, the final resolution of the *Abrams* case is of less interest than the fact that the Supreme Court addressed the matter as one of first impression and therefore could not rely on previous authoritative interpretation that would accompany the more familiar charge of treason.

In *Dennis v. United States*, we also find the presence of a previously-untested substantive charge. Eleven leaders of the American Communist Party were charged with conspiracy under the 1938 Smith Act.[69] The charge was not entirely novel. The Federal Smith Act was closely tailored after the New York Criminal Anarchy Act upheld in *Gitlow v. New York*.[70] The *Dennis* indictment fits my conception of a "novel charge" in two ways. First, this was only the third time that the federal government had prosecuted under the Smith Act. Thus, there was very little decisional law to guide the Supreme Court in this case. In addition, by the 1940s, the Supreme Court was increasingly indicating that the clear and present danger standard should apply in speech offense cases.[71] This test, first articulated in the Holmes-Brandeis dissent in the *Abrams* appeal,[72] was already becoming canon in constitutional law and raised a serious obstacle for the prosecution in proving the charge: if clear and present danger were the standard, then the Communist leaders could not be convicted because the imminence of Communist overthrow could not be proven.

A different interpretation of the *Abrams* doctrine had to obtain for

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68 Act of May 16, 1918, ch. 75, 40 Stat. 553; *see also* David Rabban, Free Speech in Its Forgotten Years 267-69 (1997).

69 341 U.S. 494 (1951).

70 *Dennis*, 341 U.S. at 562.

71 *See* Rabban, *supra* note 68, at 374-75.

72 The phrase "clear and present danger" was first pronounced by Justice Holmes in his opinion for the Court in *Schenck v. United States*. But the elaboration of its meaning as a protective standard emerged a few months later in *Abrams*. *See generally* Rabban, *supra* note 68.

conviction to follow. Indeed, the Vinson Hand formula was adopted as the correct understanding of clear and present danger.[73] The *Dennis* case is, therefore, quite similar to *Abrams*. In both cases, the Court employed novel interpretations, departing from conventional doctrine, in order to convict the defendants.

The Chicago Conspiracy Trial falls in the same category of cases as *Dennis* and *Abrams*. There as well, we find a charge of conspiracy, with demonization of the co-conspirators and bending of the laws of procedure. The indictment in the trial charged the defendants with "conspiracy to cross state lines with intent to incite a riot."[74] The statute on which the prosecution rested its case was the 1968 Anti Riot Act, passed by Congress less than a year prior to the indictment[75] in response to the rise in racial rioting in the inner cities at that time. Thus the indictment was novel, first, because this was the first case to be prosecuted under the Act and, second, because the Act, originally designed to punish race rioters,[76] was being used to prosecute members of dissenting political movements.[77]

I return now to the paradox of the novel substantive charge. On the one hand, archetypal trials of dissent revolve around the theme of fear of subversion of the existing order. The substantive charge itself is archetypal, as is evident from the Prometheus and Paradise myths. In both, the protagonist upsets the prevailing order by violating a core command designed to ensure unreflective obedience to the rulers. On the other hand, in the dissent cases

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73 Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

Dennis, 341 U.S. at 510.

74 Defendants herein, unlawfully, willfully and knowingly did combine, conspire ... to commit offense against the United States, that is: travel in interstate commerce and use the facilities of interstate commerce with the intent to incite, organize, promote, encourage, participate in, and carry out a riot ... .

United States v. Dellinger, 472 F.2d 340, 370 (1972).

75 18 U.S.C.A. §§ 2101, 2102 (2002) (originally enacted Apr. 11, 1968).

76 Known colloquially as the Rap Brown Statute, after an outspoken black activist, "the government attempted to link in the public perception black militants with antiwar protesters, most of whom were white." William M. Kunstler, My Life as a Radical Lawyer 4 (Carol Pub. 1996) (1994).

77 *See supra* note 22.

we are discussing, treason was never invoked as the charge. Rather a legal formula that amounts to a mutation of the crime of treason was applied. How may this paradox be explained?

It seems to me that one powerful explanation lies in the trajectory of the crime of treason in the context of the history of government. The history of the law of treason is the history of an increasing awareness of freedom of expression as an important constitutional principle and the concomitant recognition of the importance of granting respect to a hostile opposition. A treason trial usually obtains the opposite of what the government aspires to do: it divides instead of uniting; it destabilizes rather than ensuring stability.

The rising recognition of the dangerous potential of treason trials did not bring about an end to persecution of dissenters. Rather, alongside the enactment of constitutional buffers to protect against arbitrary and politically motivated suppression of dissent, there was a fine-tuning of the substantive law with the enactment of offenses thought to be different from those intended to be safeguarded against by the buffers. These buffers can be regarded as a "myth" that the constitutional regime prohibits the persecution of dissent. The new constitutional rules were intended to pay homage to the democratic principle while allowing the captains of the ship of state to do what they deemed necessary to prevent what they considered chaos on the doorstep. It is for this reason that so-called "new" offenses appear on the horizon periodically. Throughout the history of democracy, many archetypal trials of dissent have ended in disgrace for the system and entered the collective memory as something that should not be repeated. Whenever the urge arose thereafter to prosecute dissent, a new offense had to be invented. For example, Article III of the U.S. Constitution explicitly limits treason:

> Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.[78]

Treason was given a very restricted interpretation by Chief Justice Marshall in the Aaron Burr case. Aaron Burr, one of America's noted statesmen in the founding era and Vice-President during President Thomas

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78 U.S. Const., art. III, § 3. The Constitution goes on to provide that "[t]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." *Id.*

Jefferson's first term in office, was accused of making a treasonable effort to set up an independent government in the Southwest in the United States. Jefferson's animosity toward Burr, who was his rival during the 1800 presidential elections, was well-known. Chief Justice John Marshall, another Jefferson adversary, sitting as trial judge, led to Burr's acquittal. Marshall interpreted narrowly the evidentiary requirements for proving the crime of treason, presumable in the hope of preventing waves of persecution.[79]

John Marshall was witness to the enactment of the Alien and Sedition Act of 1798, itself a mutation of the crime of treason. While the Act expired in 1801, variations on its form continued to be enacted whenever the United States faced a crisis. Over the last hundred years, the Espionage Acts of 1917 and 1918 were enacted to cope with the First World War; the Anti Riot Act was enacted in 1968 to confront racial rioting in American cities; and the USA Patriot Act was enacted following the trauma of September 11, 2001. When tested in court during these crises, these statutes (with the exception of the USA Patriot Act) were upheld by judges, who also validated a broad statutory interpretation (thereby subsuming dissent under treason or sedition) for them.[80]

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79 Chief Justice Marshall held that intent to commit treason without acts in its commission does not constitute treason. United States v. Burr, 25 F. Cas. 2, 14 (1807) ("The crime really complete was a conspiracy to commit treason, not an actual commission of treason. If these communications were not treason at the instant they were made, no lapse of time can make them so. They are not in themselves acts. They may serve to explain the intention with which acts were committed, but they cannot supply those acts if they be not proved."). *See* James F. Simon, What Kind of Nation 220 (2002).

80 Alien and Sedition Act, 1 Stat. 596 (1798); Espionage Act, 40 Stat. 217 (1917); Espionage Act, 40 Stat. 892 (1918); Anti Riot Act, 18 U.S.C.A. §§ 2101, 2102 (1968); U.S.A. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

The "War on Terrorism" has produced a series of suggestions for new crimes. The *Wall Street Journal* reported that the Bush Administration is considering making membership in Al Qaeda a crime in itself in order to alleviate the difficulty of prosecuting captives in Afghanistan who cannot be directly connected to a specific criminal act. "One of the war crimes you could be able to prove ... is close to a status offense, which is being a member of a global terrorist conspiracy ... . [i]t's a broad theory, but one that needs to be run to get these guys." Jess Bravin, *White House Lawyers Weigh Classifying Al Qaeda Membership as a War Crime*, Wall St. J., Mar. 5, 2002, at A18.

VI. THE APPEAL TO EXTERNAL RULES OF INTERPRETATION

There is a certain symmetry to the prosecution's and defense's opening and closing arguments. Each side first invokes the positive law, claiming that proper interpretation points to conviction or acquittal, respectively. Then, however, they both invoke an external "higher law" that, they claim, supports their position.

Let us begin with the positive law. Because, as I sought to show above, the substantive charge typically is novel, the positive law is usually not entirely clear. There are no, or very few, precedents to rely on to interpret the language of the statute at hand and to guide the court and jury in coming to a decision. For this reason, it is easy for each party to insist that "the law" is on its side. In general, the prosecutor will describe conditions of chaos threatening society and the supreme value of order as justifications for its case. Implied therein is the government's denial that prosecuting the accused amounts to persecution and an insistence that the trial is a mere application of the positive law — a fundamental aspect of a society committed to the rule of law. It is in this way that the argument based on positive law is interwoven with the argument based on natural law: The government is a government of laws. Its basic purpose is to safeguard the social order, and therefore it is incumbent upon the prosecution, the government's agent, to apply the law against the defendant at hand. It is in this context that the government appeals to the "higher" justification of necessity: necessity in the guise of the prevention of chaos justifies the government's action against the accused.

We can find in the trial of Socrates one of the most famous appeals to higher law by the defense. Socrates was charged with "refusing to recognize the gods the state recognizes, ... and ... corrupting the youth."[81] He is reported to have said in his own defense to the jury,

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81 Thomas C. Brickhouse & Nicholas D. Smith, Socrates on Trial 30 (1988). Defense counsels also cite higher law in support of their case and against the prosecution's case. Another example is the case of *Brasillach*. There the defense counsel appealed to the jury's sense of justice and patriotism, insisting that the death penalty was immoral and suggesting that acquittal may heal France in its time of despair.

> [D]eath is not for [Brasillach]. Justice has no right to execute souls ... . May your verdict, in the storm raging our country, appear in the sky of sorrowful France as the first sign, passionately anticipated and more than ever necessary, of France, a just and reconciled France, do that the France may live.

Kaplan, *supra* note 48, at 184.

> Men of Athens, I hold you in high regard and I love you, but I will obey the gods more than you, and just as long as I breathe and am able, I will never cease from philosophizing or from exhorting you and from declaring my views to any of you I should ever happen upon ... .[82]

Similarly, consider the argument of Benjamin F. Butler, the U.S. prosecutor in *Ex parte Milligan*:

> We do not desire to exalt the martial above the civil law, or to substitute the necessarily despotic rule of the one, for the mild and healthy restraints of the other. Far otherwise. We demand only, that when the law is silent; when justice is overthrown; when the life of the nation is threatened by foreign foes that league, and wait, and watch without, to unite with domestic foes within, who had seized almost half the territory, and more than half the resources of the government, at the beginning; when the capital is imperiled; when the traitor within plots to bring into its peaceful communities the braver rebel who fights without; when the judge is deposed; when the juries are dispersed; when the sheriff, the executive officer of the law, is powerless; when the bayonet is called in as the final arbiter; when on its armed forces the government must rely for all it has of power, authority and dignity; when the citizen has to look to the same source for everything he has of right in the present, or hope in the future, — then we ask that martial law may prevail, so that the civil law may again live, to the end that this may be a "government of laws and not of men."[83]

The reason, claimed Mr. Butler, that Milligan and his co-conspirators should have been tried by a military commission instead of before a federal court was that lawlessness threatened the land: "the judge was deposed, the juries dispersed and the bayonet became the final arbiter."[84] Only military might could save the State of Indiana from chaos. Hence, only a military commission could judge the so-called traitors who had conspired to promote chaos and prevent the restoration of order.

Consider now the argument for the defense on Milligan's behalf, made by his counsel David Dudley Field:

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82 Brickhouse & Smith, *supra* note 81, at 137. Athens' formal gods represent the positive law. For Socrates, his own god and the imperative to search for truth (philosophize) is higher law.

83 The Milligan Case, *supra* note 46, at 223.

84 *Id.*

> [I]n the degree in which a country becomes free, in that degree the military is made dependent upon and subordinate to the civil power. *Silent leges inter arma*[85] was never the maxim of free and brave men. They prefer that other and better maxim, *Cedant arma togoe*;[86] and the spirit which prevailed when Roman citizenship was a sign of freedom as well as glory, and the proud words, "I am a Roman citizen," were a protection against lawless power in the depths of Scythian forest or under the shadow of African mountains. May we not expect that from this day

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85 *Silent enim leges inter arma* means "Laws are silent in times of war." Cicero, Pro Milone 16 (N.H. Watts trans., 1972) (1931). Compare Chief Justice Aharon Barak's reflections on this maxim:

> There is a well known saying that when the cannons speak, the Muses are silent. Cicero expressed a similar idea when he said that "*inter arma silent leges*" (in battle, the laws are silent). These statements are regrettable; I hope they do not reflect our democracies today. I *know* they do not reflect the way things should be. Every battle a country wages — against terrorism or any other enemy — is done according to rules and laws. There is always law — domestic or international — according to which the state must act. And the law needs Muses, never more urgently than when the cannons speak. We need laws most in times of war. As Harold Koh said, referring to the September 11, 2001, attacks: "In the days since, I have been struck by how many Americans — and how many lawyers — seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules. In fact, over the years we have developed an elaborate system of domestic and international laws ... precisely so that they will be consulted and obeyed, not ignored, at times like this."

Aharon Barak, *Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 Harv. L. Rev. 19, 150-51 (2002).

> When the cannons speak, the Muses are silent. But even when cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.

Id. at 151 (quoting himself in H.C. 168/91, Morcos v. Minister of Def., 45(1) P.D. 467, 470 (Gulf War case regarding unequal distribution of gas masks in the West Bank between Arabs and Jews)).

For an authoritative analysis of the Israeli Supreme Court's jurisprudence regarding human rights in the Occupied Territories, see David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (2002).

86 The full Latin maxim is *cedant arma togae, concedat laurea laudi*, meaning: "Let arms yield to the toga, and the laurels to laudation." Cicero on Duties 731 (M.T. Griffith & E.M. Atkins eds., Cambridge Univ. Press 1991).

> forth the proud claim, "I am an American Citizen," will be a title and guarantee of freedom from all human rule but of the law of the land![87]

VII. SHIFT OF FOCUS FROM THE GOVERNMENT TO THE JUDGE

One interesting feature of the archetypal trial of dissent is the shift in focus that occurs midway in the trial from the government as persecutor of the dissent to the performance of the judge presiding over the trial. When the trial begins, all eyes are on the government. The government, through its agent the prosecutor, is perceived either as defender of the realm and its time-honored values or as suppressor of legitimate dissent, depending on one's perspective of the particular situation at hand. The expectation of the judge, the neutral arbiter of the laws (which are independent from politics), is that she will render "justice." Soon after the beginning of the trial, however, a shift in focus occurs. The judge becomes the focal point of attention and is increasingly perceived either as martyr or villain, again, depending on one's perspective. But whether viewing the judge as martyr or villain, few at this moment think of her as a neutral arbiter. Rather, she is more and more identified as the long arm of the government. Those who side with the government hail her as a martyr, whereas those who sympathize with the dissenters denounce her as a villain. In both cases, the system of laws and the institution of the judiciary are tainted by political bias.

Moreover, at the end of the trial, the judge becomes the focus of the public's attention and a new debate is begun, concerning the propriety of her actions during the trial.

One example that illustrates this phenomenon is Judge Julius J. Hoffman who presided over the Chicago Conspiracy Trial, whose sympathy was well-known to lie with the government's position.[88] Another example is Judge Henry DeLamar Clayton, Jr., the trial judge in *Abrams*. Historian Richard Polenberg, in his book on the *Abrams* trial, introduced Judge Clayton in a special chapter entitled *The Judge as Prosecutor*. Polenberg documented in detail Judge Clayton's performance, saying:

> The distinctive feature of the Abrams trial is not that Judge Clayton actively interrogated the defendants, but rather that his questions were framed in such a hostile, argumentative manner, and were so clearly designed to put the anarchists' behavior in a sinister light. The judge,

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87 The Milligan Case, *supra* note 46, at 201.

88 *See supra* note 20.

> by making damaging remarks about the defendants, and what he called their "puny, sickly, distorted views," helped make the case for the prosecution.[89]
>
> Finally, Judge Harold Medina, who presided over *Dennis v. United States* (the Communist Party case), was described as follows by historian Michael Belknap:
>
> Medina's resentment of the defense grew and grew, until he became more adversary than arbiter, with the result that many of the most spectacular scenes in the drama which unfolded at Foley Square involved battles between the Communist side and an antagonist on the bench.[90]

A judge's performance in such archetypal trials typically displays two main characteristics. First, the judge appears to lean toward the prosecution in the interpretation of procedural law and rules of evidence. For example, in the Chicago Conspiracy Trial, Judge Hoffman insisted that a technicality in the filing of appearance turned Attorney William M. Kunstler into counsel for defendant Bobby Seale. Both Seale and Kunstler vehemently rejected this interpretation. Judge Hoffman's decision on this matter, in the very first few days of the trial, set the tone of the entire trial. In hindsight, it was deemed wholly inappropriate by the Court of Appeals.[91]

Richard Polenberg shows how Judge Clayton's questions and remarks during the *Abrams* case were aimed at demonizing the defendants.[92] For example, when defense counsel asserted that the defendants'

> intent in printing and distributing the leaflets had been lawful, Clayton, noting the secrecy with which the anarchists had acted, interjected that when we "do things that we are not ashamed of. And we are not violating the law ... we come out in the open, but when we do things questionable. That is the time when other methods are resorted to, and I am going to leave it to the jury to determine whether the intention is honest or not".[93]

Dennis v. United States, already mentioned above, merits further consideration.[94] In *Dennis*, twelve members of the American Communist

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89 Polenberg, *supra* note 65, at 118-19.

90 Belknap, *supra* note 47, at 69.

91 United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

92 Polenberg, *supra* note 65, at 119.

93 *Id.*

94 341 U.S. 494 (1951).

Party were prosecuted for conspiring to teach the overthrow of the government with force and violence. The evidence against the twelve consisted of conventional Marxist-Leninist literature. District Court Judge Harold Medina allowed the prosecution to focus on those sections in the literature that proved the violent streak of the teachings. He denied the defense's requests to introduce into the record "the complete books ... along with other works by the quoted authors."[95] As historian Michael R. Belknap posits, Judge Medina's insistence that the defense could offer only those parts of books and articles that directly refute the government's accusations "enabled the prosecution to overemphasize greatly the importance of violence in Marxist-Leninist theory."[96]

The reasons for the lack of judicial statesmanship in such cases are complex. Let us start by eliminating some of the possibilities. The relative experience of the judges could not be considered as directly relevant. Judges Julius J. Hoffman and Henry DeLamar Clayton, Jr., were experienced judges with many years in the courtroom behind them when they tried the respective cases. In contrast, Judge Harold Medina was only eighteen months on the bench when the *Dennis* trial began.[97] The judicial performance, therefore, could not be directly attributed to experience or a lack thereof. Another possibility is choice of the presiding judge. Were these judges selected because they were reputed to have a firm hand and would therefore more easily handle the tensions bound to emerge during such trials? Were they chosen at random? There is no evidence that either Judge Hoffman or Judge Clayton was especially chosen for the task.[98] However, Michael Belknap asserts that Judge Medina was hand-picked for the task by Chief Judge John Knox.[99] Another hypothesis may be age. Hoffman was seventy-four years old, too old, some would say, to deal with a group that adhered to the slogan that "You should not trust anyone over thirty." He may have been too entrenched in his commitment to the status quo to understand that times were changing. However, Judge Medina was relatively young and, if age were a controlling factor, would have been expected to be more sensitive to the needs of the defense.

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95 Belknap, *supra* note 47, at 89.

96 *Id.*

97 *Id.* at 68.

98 There were rumors regarding the special selection of Judge Hoffman for the task for the reason that he had the reputation of a hanging judge, but there is no documented evidence to support this assumption. *See* Epstein, *supra* note 20, at 95; Shultz, *supra* note 20, at 5.

99 Belknap, *supra* note 47, at 68.

Thus, age cannot be a decisive variable. It does appear, however, that a judge's personal circumstances and values may be factors. All the judges in the small sample presented here were members of the upper-middle class. They were wealthy and comfortable and therefore somewhat more likely to prefer the status quo and be suspicious of efforts to upset it. It may well be that they began the trial with the patriotic confidence that the government was doing the right thing.

Similarly, it appears that temperament is an extremely important element. All of these judges were known for their hubris, their tendency to engage in repartee, and their insistence on having the last word. They were authoritarian patriarchs who did not have patience for adversity. This type of temperament does not bode well for a group of defendants who are brought to court because of their defiance of society: this defiance clashes with the judge's penchant for asserting authority.[100]

The structure of the trial as a "conspiracy" feeds on the likelihood that the judge's authoritarianism will balloon during trial. The fact that the defendants constitute a group and that several attorneys are in charge of the defense increases the number of the members of the defense team, nurtures the self-righteousness of the defense-team members, and helps them to encourage and support each other against the judge. As a result, the judge is caught in a spiral of verbal violence and abuse that she herself is a part of and therefore unable to control or diffuse.

One more variable is important to observe. The judge sits alone on the podium. She has no one to consult or deliberate with. Thus, the likelihood that she will find herself isolated and feeling backed into a corner — almost threatened by the defendants — may only serve to reinforce the general sense of danger engendered by the nature of the trial: dissent and looming social chaos. The defendants, who initially arrive at court as the enemies

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100 See Lahav, *supra* note 20, for an analysis of Judge Hoffman's authoritarianism. Of course, the circumstances surrounding trials of dissenters are important and may affect judges as a group. Geoffrey R. Stone examined the question whether Congress had intended the Espionage Act of 1917 to be an instrument in the prosecution of dissent. He found that it had not. His conclusion:

> Most federal judges during the First World War were "intent upon meting out quick justice and severe punishment to the 'disloyal,' and no details of" legislative interpretation or appeals to the First Amendment were likely "to stand in the way" ... . These judges were operating in a feverish atmosphere, not the most conducive to careful judicial reflection. Too often, they gave in to the pressures of time and to their own fears and distaste for "loyalty."

of the state, are now also the enemies of the judiciary. As such, the judge quickly comes to feel, they must not be tolerated.

VIII. THE APPELLATE COURTS

It is left to the appellate court to reflect on the trial and in a somewhat detached manner. The benefits of hindsight, the company of other judges, the distance from the heat of the actual trial, all facilitate self-consciousness and the transcendence of the archetypal in favor of a more nuanced picture of the events. Of course, appellate courts do periodically identify with the government and trial court judge and assist the government in its quest to appear as the hero who has saved the innocent from sinister forces. Justice Oliver Wendell Holmes' famous statement in justification of the conviction in *Schenck v. United States* captures this mood succinctly: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[101]

However, the appellate courts do intervene particularly when the focus during the trial has shifted from the government's effort to suppress dissent to the judge as collaborator with the government. They may rebuke the judge for his or her behavior and, at the same time, censure the defendants, by denying the defendants too clear a victory. Even if the conviction is reversed, the case or parts thereof are typically remanded for a new trial and the defendants are admonished and sternly ordered to behave.[102] A rhetorical speech about the significance of the rule of law is usually inserted in the appellate court decision. The appellate court's effort, it seems, is not focused on the subject-matter at hand (did the defendants threaten the existing order), but on the urgent need to save the integrity of the judiciary and uphold the appearance of rule of law.

Thus, once a judge (mostly on appeal, but sometimes in the lower court as well) is freed from the grip of the archetype, he or she is able to restore the meaning of separation of powers and rational, dispassionate review. The appellate court may thus be willing to accept ambiguity and nuance, to rest its judgment on the less heroic notion that even in a society that believes in

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101 249 U.S 47, 52 (1919).

102 Even Justice Holmes, who thought (in dissent) that the *Abrams* defendants were protected by the First Amendment, referred to them as "poor and puny anonymities." Abrams v. United States, 250 U.S. 616, 629 (1919).

the rule of law, one finds a little bit of order and a little bit of chaos mixed together.

CONCLUSION

This article is a preliminary attempt to study the trials of dissenters as a phenomenon of culture.[103] Certainly further work is required to better understand this phenomenon and map its morphology and nuanced mutations. The opening quote from marketing theorists Mark and Pearson seems an adequate point of departure for further inquiry. When is a trial of dissent "a product that does what it actually promises"?[104] If the trial of dissent is a "legitimate product," the implicit assumption is that there will be rare occasions when the regulation of the content of political speech is legitimate. The notion of the archetypal warns modern democracies that their historical commitment to freedom of speech and their elaborate jurisprudence designed to guarantee political speech may not work when a crisis upsets the nation. In other words, despite the legal barriers, the system may consider the trial of dissent to be legitimate and proceed with the prosecution of unpopular speakers. Those who operate the system may become victims of the archetypes, puppets in the hands of deep and powerful forces. Moreover, there may be cases where the product does not actually do what it promises to do. In other words, the trial of dissent may be launched for reasons other than the need to protect society or its institutions. The trial may be a placebo, and "its effect is important because the meaning itself can have a positive effect on the consumer." In other words, the trial may energize the citizenry to support the government even if the dissenters actually pose no danger at all. Archetypes may be invoked and manipulated by the government to give it legitimacy it does not deserve. This is the point at which the ground becomes treacherous indeed, for the one manipulating the archetypes may also be manipulated by them without any assurances that some control over the process is at hand.

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103 One of the most important works in this area is Otto Kirchheimer, Political Justice, The Use of Legal Procedure for Political Ends (1961). *See also* Michael Walzer, The Revolution of the Saints (1965); Anthony G. Amsterdam & Jerome Bruner, Minding the Law (2000). My own analysis is limited to a small part of the field of political trials, namely, that of the trial of dissent and dissenters.

104 Mark & Pearson, *supra* note 1, and accompanying text.