

LET'S PRETEND? POLITICAL TRIALS IN AUSTRALIA, 1930–39

ROGER DOUGLAS*

The case ... caused quite a fuss in London. Which is what the appellant wanted, apparently. Publicity. Another victim of oppression, et cetera. A re-run of the Sacco-Vanzetti affair. It's a new and effective ploy, these trials. Create a martyr and stir up support. Defence funds. Placards in the street. Torchlight processions. It's all a form of radical propaganda.¹

I INTRODUCTION

Studies of political trials often highlight the degree to which political dissidents have been able to use trials to great effect. They provide numerous examples of trials that turned out to be triumphs for the defendants, but far fewer examples of political trials that have come to be seen as political and moral triumphs for the state.² The persistence of political trials suggests that prosecutors nonetheless assume that there are advantages to political prosecutions. There are various reasons why this may be so. One is that dissidents and the state may have different objectives. Defendants may be concerned to make a political point. The state may be concerned with achieving convictions or with using trials as a form of harassment³ and may sometimes launch prosecutions primarily in response to external pressures. A second is that it is easy for parties to a political trial to make mistakes. Parties have only limited control over the script, and even less over the way in which that script is transmitted and interpreted by its audience.

* Senior Lecturer, School of Law and Legal Studies, La Trobe University.

1 Nicholas Hasluck, *Our Man K* (1999) 147.

2 See, eg, the trials discussed in Michal R Belknap (ed), *American Political Trials* (revised ed, 1994); Ron Christenson, *Political Trials: Gordian Knots in the Law* (1986); Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961).

3 For instance, while four-fifths of the Cold War prosecutions of American communists under §§ 2, 3 of the *Smith Act*, 18 USC §§ 10, 11 (1946) were ultimately unsuccessful in the sense that defendants were either acquitted at trial, or (more usually) successful on appeal, the trials had a devastating effect on the Communist Party of the United States of America: Michal R Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (1977). Jessica Mitford considers that the trial of Dr Spock and his codefendants may have been intended to deter 'respectable' protesters: Jessica Mitford, *The Trial of Doctor Spock* (1969) 57.

Guesswork is inherent in political trials. Where there are guesses, there will be mistakes.⁴

This paper examines the problems facing those who seek to politicise 'political trials' and argues that these are such that in liberal democracies political trials are typically run in much the same way as conventional contested 'non-political' trials. Defendants who might be attracted, in principle, to politicising their trials may be constrained by possible audience reaction, and by the frequent need to weigh politicisation against substantive outcomes. Prosecutors are likely to be mindful of the danger that attempts to politicise will undermine not only the credibility of the prosecution case, but the credibility of the prosecution's politics. Courts are likely to be anxious to strip cases of their political dimensions.

This analysis is based on a survey of the trials of Australian communists and communist sympathisers⁵ in the 1930s. It highlights the degree to which an acute awareness of the importance of politicising trials coexisted with far more subdued practices. I shall argue that while the defendants often introduced political elements into their trials, they rarely ran their trials in accordance with the strict version of the 'proletarian self-defence' advocated by the Communist Party of Australia ('CPA' or 'the Party') and by the relevant front organisations. Even at the height of the Party's 'class against class' phase (1930–32), they tended not to use the courts to proclaim and defend the need for revolution, but rather to criticise the state in relation to the particular issues underlying their arrest. While they sometimes pressed the limits of criminal and court procedure to achieve their political objectives, they generally operated within parameters laid down by the court.

Their strategies sometimes provided opportunities for prosecutors to develop negative images of communism. However, the development and mobilisation of negative images of communism seems to have been not so much an end as a means of achieving the prosecutors' primary objective – securing convictions. Political arguments rarely impressed magistrates, although there is some evidence to suggest that they saw merit in the liberal-democratic arguments raised by some defendants. Juries, however, seem to have been receptive to strategically-framed political arguments. Judges (who were typically presented with non-political arguments) generally seemed willing to handle appeals as if

4 See, eg, Belknap, *Cold War Political Justice*, above n 3, 58–121, 281, who argues that the decision of Eugene Dennis and his comrades to politicise their first instance trial in the way they did alienated the court and the public and, by distracting attention from the legal strength of their case, increased the likelihood of their being convicted: see especially 70–1, 91–2, 107, 114, 281. Joseph Skvorecky, 'The Theatre of Cruelty', *New York Review of Books*, 16 August 1990, 41 explores the failure of the Czech show trials – at least insofar as they were intended to constitute propaganda. The works cited above, n 2 provide numerous examples of political trials which backfired. See also Norman Dorsen and Leon Friedman, *Disorder in Court* (1973), especially 43–71.

5 A handful of political trials in the 1930s involved anti-communists, particularly members of the New Guard. These amounted to less than 2 per cent of all political trials held during that period. In the 1930s, political trials typically involved communists and those sympathetic to particular communist causes. From a researcher's point of view, it is a pity that there were not more trials of anti-communists, since it would be interesting to compare rightists' and leftists' trial strategies. However, trials involving rightists were too few and too heterogeneous to provide basic generalisations about 'right wing' trial strategies.

they were exercises in legal logic rather than attempts to adjudicate between communism and capitalism. Courts sought to strip cases of their political significance, but 'taken for granted' prejudices sometimes surfaced. Magistrates sometimes made their distaste for communism clear, especially in the early 1930s. Judges, however, proved to be masters of de-contextualisation, with their judgments impressive for their capacity to transform politics into law.

II CONCEPTS AND DATA

My analysis is based on a large sample of political trials of Australian communist and leftist defendants from 1930–39. The meaning of the term 'political trial' is a matter of some dispute.⁶ The varied ways in which it has been defined suggests that it is pointless to seek a 'correct' definition, but it is important to make one's own meaning clear. For the purposes of this paper, a 'political trial' involves the trial of a person for an offence actually or allegedly committed in the course of some form of activity aimed at the achievement of some collective good.⁷ The decision to prosecute need not have been based on the defendant's politics. Nor need the charges involve offences defined by elements which include some form of political motivation. While the label 'political trial' can be taken as implying something sinister about the decision to charge the defendant, the definition used for the purposes of this article neither depends on, nor implies, sinister motives on the part of the prosecutor.

The cases with which I am concerned are cases involving the trial of people arrested in relation to activity organised by the CPA and by groups associated with the CPA. Those arrested include members of the CPA, self-professed communists, sympathisers with some form of communism, supporters of causes which were also supported by communists, and possibly some bystanders who had the misfortune to be in the wrong place at the wrong time. When I refer to a person as a communist, I shall be referring only to those who were members of the Party or who appear to have seen themselves as communists. I shall refer to other arrestees as 'leftists', except where there is evidence that they were apolitical or hostile to the left. Where comprehensive reports of cases exist, the defendants' politics are often clear. Where (as is usually the case) reports are scrappy, direct information about arrestees' politics is usually lacking, but in the

6 See, eg, Michal R Belknap, 'Introduction: Political Trials in the American Past' in Michal R Belknap (ed), *American Political Trials* (revised ed, 1994) ix, xii–xix; Christenson, above n 2, ch 1; Kirchheimer, above n 2.

7 The definition includes cases arising out of industrial disputes as well as disputes arising out of attempts to achieve changes in government policy (although it is often hard to draw the line between the two, especially when communists were involved in the relevant incidents). It includes criminal trials, appeals, and applications for judicial review. The definition is slightly narrower than that favoured by Belknap, 'Introduction', above n 6, xvi, in that it does not include trials which are political only in the sense of their outcome being determined by political considerations, nor cases which are political only in the sense that they came to be regarded as politically significant. It does not include purely civil actions. Little turns on these exclusions. There seem to have been very few such cases during the period under examination.

absence of such evidence, there are guides, including whether a person's court appearance is the subject of favourable comment in the *Workers' Weekly*.

The following analysis is based on a sample of almost 900 cases arising out of arrests connected with participation in leftist activities between 1930–39. This sample is neither a complete nor a random sample of arrestees. It is based on all cases reported in the *Workers' Weekly* between 1930–39, and all cases referred to in the indexes to the *Sydney Morning Herald* and the *Melbourne Argus* during that period. It is supplemented by data supplied by the New South Wales police to the Commonwealth in relation to its prosecution of Harold Devanny under the *Crimes Act 1914* (Cth). When I have found reports of arrests in connection with protests in jurisdictions other than New South Wales and Victoria, I have scanned newspapers in Adelaide, Brisbane, Darwin, Hobart and Perth for details of subsequent court cases, assuming that if there were no reports within one month of the protest, it was unlikely that there were going to be any. I have also consulted court records in Victoria for supplementary information. The sample probably over-represents those charged in city as compared with suburban and rural courts. In particular, it seriously under-represents the hundreds of defendants charged in relation to activity on the northern coalfields of NSW in 1929–30. It almost certainly over-represents Melbourne and Sydney arrestees, given that the *Sydney Morning Herald* and the *Melbourne Argus* are the only two newspapers with comprehensive indexes.⁸ The sample also suffers considerably from missing data. Reports usually omit details of plea, and when cases are adjourned, it is common for the subsequent hearing to receive no coverage, so that details of verdict and sentence are also lacking. *Workers' Weekly* reports

⁸ The sample includes a high proportion of those arrested in connection with participation in reported political protests, but it is clearly far from complete. I have been able to identify gaps such as:

- (1) The *Workers' Weekly* refers to the trials or imminent trials of at least two hundred workers, arrested for their role in the northern coalfields dispute. While several reports give the names of those charged, and their fate, some provide only aggregate statistics, eg: 'Police Charges Fail', *Workers' Weekly* (Sydney), 7 February 1930, 1 (trial of 10 miners, all charges dismissed); 'Terrorism on Coalfields', *Workers' Weekly* (Sydney), 14 February 1930, 1 (trial of 96 miners at Kurri - all were convicted, with eleven fined £10 (three months in default), five fined £5 (or 2 months) and the remainder £3 or one month in default). Other reports foreshadow trials, but give no details of final outcomes: 'Police in the Dock', *Workers' Weekly* (Sydney), 31 January 1930, 1 (100 summonses taken out against participants in Ashtonfields mass picket); 'Eighty More Victims', *Workers' Weekly* (Sydney), 14 February 1930, 1 (80 of the participants in the Ashtonfields picket to face trial).
- (2) There is a report that in New South Wales in 1932, 340 people were imprisoned for working-class activity, serving an aggregate of 65 years imprisonment: National Archives of Australia: Attorney-General's Department; A4671/1, Attorney-General: Special Correspondence Files 1905–51; Bundle 89/SF42/1 Reports of the Investigation Branch of the Attorney-General re Subversive Organisations and their Propaganda Material.
- (3) Even allowing for the fact that some of these may have been sentenced in 1932, and that some (and possibly most) of them were fine defaulters rather than people sentenced to prison, this number is considerably greater than the number of people in the sample convicted in New South Wales in 1932. There are reports in the *Australian Labor Defender* that 93 people were arrested for political offences in New South Wales in 1933 and 55 in Victoria: 'News from Districts and Locals' (1934) 1(5) *Australian Labor Defender* 15, 15. Ninety-four people were arrested in protests over the right to sell literature in the Sydney Domain in 1934: F G Bateman, 'ILD Fights Literature Ban' (1934) 1(7) *Australian Labor Defender* 5, 5. No reports appear to exist in relation to many of the former and most of the latter cases.

were particularly likely to omit outcome details. Therefore, the data must be treated with some care and allowance made for possible biases. The comprehensively reported cases cannot be treated as typical. The sample of routine cases must be treated as in part the product of the processes which determine that particular cases are newsworthy. While sample bias is clearly a problem, it is surmountable as long as there is no reason to believe that the findings reported below can be attributed to the sample's likely bias. Moreover, it ensures that, in contrast to most studies of political trials, there are numerous accounts of 'low stakes' political trials.

In one important respect, the sample is not biased unduly. The Party's willingness to resort to militant tactics changed over time. Between 1930 and 1932, the Party and its front organisations engaged in constant confrontations with the police. In all states, there were violent clashes between police and demonstrators over the right to march. In New South Wales in particular, there were confrontations in relation to the militant anti-eviction campaign conducted by the Unemployed Workers' Movement. Articles in the *Workers' Weekly* described these confrontations with relish and pride.⁹ After 1932, the Party largely abandoned violence as a political tactic. Demonstrators tended to beat a strategic retreat rather than engage in violent struggles with the police.¹⁰

The major confrontations between police and communists and their allies stemmed from struggles over the right to use public places as political forums. The 'free speech' campaigns involved continued confrontations, but on a smaller scale than had been the case in 1930–32. The 'free speech' protests died down after 1934, largely due to the movement's success in extracting concessions and partly due to declining enthusiasm for violent confrontations with the police. Thereafter, there were occasional confrontations, but these were exceptional rather than routine. Arrests became steadily less frequent after 1932, although even in 1933, a substantial proportion of the arrests that did take place involved charges of resisting arrest, resisting police, and assault. Table 1, below, expresses the types of offences as a percentage of all offences for which leftist political arrestees faced trial in 1930–39.¹¹

9 For details of confrontations see, eg, Ralph Gibson, *The People Stand Up* (1983) 14–15, 20, 50; L J Louis, *Trade Unions and the Depression: A Study of Victoria* (1968) 162, 169–70, 182–91; Stuart Macintyre, *The Reds: The Communist Party of Australia from Origins to Illegality* (1998) 192–5, 207–13.

10 Macintyre, above n 9, 208–11, 226–8, 239–40. The reports of a freelance spy to the Commonwealth Investigation Branch contain similar reports of the Party's changing attitude to violence (and of a degree of resistance to the new approach): National Archives of Australia: The Investigation Branch, New South Wales; C1189/7, Investigation File, single number series with 'N' [New South Wales] prefix, 1932–62; 11879Z Communist Party [Box 1], 1932–39.

11 The vast majority of defendants (78 per cent) were charged on only one count. Where defendants were charged on several counts, they were classified according to the most serious charge.

TABLE 1: TYPE OF OFFENCE, BY YEAR OF TRIAL, LEFTIST POLITICAL ARRESTEES, 1930–39.

Offence category	1930 (%)	1931 (%)	1932 (%)	1933 (%)	1934–35 (%)	1936–37 (%)	1938–39 (%)
Vagrancy	10.0	3.4	0.0	4.9	0.0	0.0	0.0
Bill-posting, leafleting	9.0	2.0	3.2	0.0	15.9	8.7	7.7
Disobeying police, unlawful demonstrations	42.5	2.7	15.3	29.5	13.6	58.7	43.6
Public order	21.1	26.8	33.1	32.8	2.3	0.0	48.7
Malicious damage, theft	7.1	2.7	0.0	4.9	2.3	2.2	0.0
Assault, resisting police etc	9.2	61.7	45.9	26.2	52.3	28.3	0.0
Political offences	1.1	0.0	2.5	0.0	0.0	0.0	0.0
Other (including migration offences)	0.0	0.7	0.0	0.0	13.6	2.2	0.0
Total Number	379	149	157	61	44	46	39

III POLITICISING TRIALS: DEFENDANTS

The Communist Party took trials seriously. Stalin was mindful of the use that prosecutors could make of political trials and his staging of carefully choreographed trials became one of the features which distinguished Soviet from Nazi tyranny.¹² Communist faith in trials was also reflected in the belief that the trials could be used as propaganda against the state. Sometimes, through their subsidiary organisations, communists involved themselves in emblematic trials of non-communists, organising legal representation, and conducting vigorous campaigns on the part of the defendants. In the United States ('US') the communist-linked International Labor Defense, a branch of the International Red Aid ('Red Aid'), played a considerable role in transforming the Sacco-Vanzetti case into such a cause célèbre that even today it can arouse passion among people

12 Joel Carmichael, *Stalin's Masterpiece: The Show Trials and Purges of the Thirties - The Consolidation of the Bolshevik Dictatorship* (1976); Karel Kaplan, *Report on the Murder of the General Secretary* (1990); Béla Szász, *Volunteers for the Gallows* (1971). Carmichael points out, however, that even Stalin was sparing in his use of show trials. There were only three major sets of show trials in the late 1930s, involving a handful of prominent defendants. The overwhelming majority of those killed and imprisoned during the purges of the late 1930s were not tried at all. This was also the case for the postwar trials in Eastern Europe. A condition for being a defendant in a show trial was that the authorities could trust one not to depart from the assigned script.

who have little idea of what either Sacco or Vanzetti were actually supposed to have done. The International Labor Defense also succeeded in transforming the trial of the 'Scottsboro boys' from a depressingly ordinary Alabama rape trial into an indictment of southern race relations. Naturally, the greatest concern of communists was with using the trials of communist defendants to maximum advantage. Relations between communist parties and the law were of such importance that specialist international organisations were established to run international trial-based campaigns. The organisations acted as clearing houses for information about persecution, informing local sections about how trials were best conducted. These bodies included the International Class War Prisoners' Aid ('ICWPA') and the Red Aid.

An active section of the ICWPA existed in New South Wales. It played an important role in arranging the defence of many of the hundreds of people arrested in the early Depression years. A Victorian section was established in 1930–31.¹³ Membership included not only party members, but also left-wing members of the Australian Labor Party ('ALP') (including Senators Rae and Beasley) and leftist civil libertarians such as Maurice Blackburn.¹⁴ Its activities included providing legal aid and advice to those arrested for left-wing political and industrial activity and raising money for the care of the families of activist prisoners. In the course of the early 1930s, a number of other ad hoc bodies supplemented its activities. In 1932, the ICWPA and the recently created United Front Against Fascism were amalgamated to form the International Labor Defence ('ILD') – with local spelling, and international affiliation.¹⁵ It performed similar functions to those performed by the ICWPA. The Party, the ICWPA and the Red Aid all saw trials as occasions for advancing the Party's ideological interests. Trials would be occasions for the proclamation of the Party's ideology. They would also be used as occasions for mobilising support for the Party and its associated organisations. It is one thing to have a goal; it is another to decide what it implies and how it might best be achieved. Faced with these problems, the ICWPA and the ILD¹⁶ adopted relatively pragmatic and successful strategies

13 'Communist Intrigue', *Argus* (Melbourne), 6 September 1930, 21; "'Class War' Prisoners', *Argus* (Melbourne), 7 November 1930, 7; "'Class War' Prisoners', *Argus* (Melbourne), 27 November 1930, 5.

14 'Communist Intrigue', above n 13; "'Class War' Prisoners', *Argus* (Melbourne), 27 November 1930, 5. The New South Wales State Labor Party subsequently ruled that that the ICWPA was a communist body: The Victorian Trades Hall Council, while sympathetic to some of its objectives, refused to have anything to do with it: Louis, above n 9, 170.

15 Macintyre, above n 9, 268. In addition to its role in defending political offenders, the ILD provided legal advice and assistance to people otherwise not able to afford it. One of its more notable 'non-political' cases involved the organisation of Tuckiar's defence. Kylie Tennant has described its day-to-day activities – '[i]n and out of George [Bateman]'s office above Pelligrini's ... flowed the tide of human woe. Cast-off *de facto* wives, evicted families, deserted children, the bereaved, the aggrieved, the penniless': Kylie Tennant, *The Autobiography of Kylie Tennant: The Missing Heir* (1986) 97–8. George Bateman (who ran the ILD) was assisted, inter alia, by Tennant and by a police spy whose contribution was valued by Bateman because the spy had to work three times as hard as everyone else to prove that he wasn't a spy: Tennant, 98.

16 The ILD also gave advice designed to reduce the likelihood that people apprehended by the police would be charged. Where possible, for example, it arranged for those who took part in line-ups after brawls with members of the New Guard to appear clean-shaven and dressed in suits: Tennant, above n 15, 97.

(and in the course of doing so earned the censure of the Red Aid on more than one occasion).

A Real Working-Class Defences

The Party issued various pieces of guidance to defendants. In 1930, the Central Committee advised that:

The correct attitude as to method, demeanor, and conduct on trial is exemplified in the case of Joe Shelley in the recent trial at West Maitland.

The defence, which was undertaken by the ICWPA through its solicitors, instructed a barrister, whose function it was to provide the fullest opportunity for Shelley to put up a real working-class defence. This method was a complete success, because per medium of anticipated questions, the correct working-class answers were secured.

It must not be thought, however, that success in this case means that success can be secured by the same methods in all other subsequent cases, for we can expect the prosecution and the magistracy to adopt every expedient to counteract our utilisation of the court as a sounding box for revolutionary propaganda.

Where we are denied opportunity – as a result of interference by prosecution, magistrates, or even lawyers for the defence – to state our case from a working-class point of view, the only alternative remaining is direct contempt of court. This can only be done by the accused indicting the whole court and procedure as a master-class institution from which no justice could be expected.¹⁷

This assumes that there is such a thing as a 'real working-class defence'. This assumption is one that was widely shared within communist parties and within the ICWPA and the Red Aid.¹⁸ The 'working-class defence' had several elements. First, the defence would be political and under the direction of the ILD. Defendants would defiantly assert their revolutionary credentials. They would use the case to develop arguments which would effectively place the capitalist system and its courts on trial. They would be prepared to challenge the legitimacy of the courts and they would refuse to submit to their authority. They would not agree to be released on good behaviour bonds, and they would go to prison rather than pay fines imposed for their participation in political activity. Secondly, defendants would be primarily responsible for the conduct of their trial. If lawyers were involved, their role would be a subsidiary one, devoted to assisting defendants to communicate their message. Thirdly, the defence would involve use of the trial as an occasion for mobilisation. Trials would be accompanied by demonstrations both inside and outside the court. Protest meetings would be called at which the trial would be discussed. Pressures would

17 'Fines or Gaol?', *Workers' Weekly* (Sydney), 31 January 1930, 2.

18 For an American exposition of what this involved, see W L Patterson, 'How We Organize: The International Labor Defense and Courtroom Technicians' (1933) 9(5) *Labor Defender* 54. These principles were taken seriously by the American International Labor Defense and governed the way in which the prosecution of Eugene Dennis was handled. However, even in America, trial strategies varied, from the militant approach taken in this case through to the relatively conventional approach taken in the vain attempt by the International Workers Order to resist its deregistration as an insurer: Arthur J Sabin, *Red Scare in Court: New York Versus the International Workers Order* (1993). In other examples, one Californian defendant refused orders to rely on a classical political defence and a Seattle defendant, unable to comply with instructions to do so, committed suicide: Belknap, *Cold War Political Justice*, above n 3, 167–9.

be placed on governments to discontinue prosecutions and to release political prisoners. The advice envisaged the need for flexibility, but even after 1932 Party publications emphasised the need to politicise trials.¹⁹

However, there are problems associated with politicised defences. One was that different audiences are likely to react differently to a given message. A revolutionary message might strike a chord with people totally alienated from the capitalist system – and by 1932, the capitalist system was patently failing to achieve the one thing it was normally good at: production. At the same time, the Party's revolutionary rhetoric was also capable of alienating people who shared the Party's views on some issues, while rejecting its approach to others. Messages which might appeal to potential revolutionaries might simultaneously alienate people who were opposed to revolution, but who were otherwise willing to support the Party's right to exist and propagate its ideas. Moreover, under Commonwealth law, a body that advocated revolution constituted an unlawful association.²⁰ For the Party to proclaim its commitment to revolution was also to provide evidence for those who sought its proscription. In trials, as in other aspects of its life, the Party was constrained by the problems associated with mobilising support and disarming opponents.

A second (and related) problem was that conducting a 'working-class defence' might be hard to reconcile with the use of courts to achieve favourable trial outcomes. These problems are illustrated by Shelley's case – the 1930 exemplar of worker defence cases.²¹ Joe Shelley had been charged with inciting murder based on a speech he had given at the Kurri School of Arts on 8 January 1930. According to Constable Latrobe, his speech included the words:

What you must do is arm yourselves with rifles, bayonets, and milk-tin bombs, which you returned soldiers know how to make. Possibly you will get aeroplanes and machine-guns when you return. Do not go in mass formation, but in extended order and platoons.

Shoot down the scabs and tools of the master class. You returned soldiers have had experience in the right direction. You must use that experience to the best advantage.²²

Latrobe had taken no notes at the time, and while he had written a statement with Constable Barber, he had not seen it since. The credibility of his claim to be able to remember the exact words that Shelley had uttered was undermined when Clancy for the defence read out a passage of 120 words from the *Labor Daily* and asked Latrobe to recite it back. He failed dismally. Constable Barber said that he had taken notes, but these involved no more than disconnected phrases. That was the case for the prosecution. The magistrate rejected Clancy's submission that there was no case to answer and Clancy elected to call evidence.

19 See, eg, 'A Worker in Court' (1933) 1(4) *Australian Labor Defender* 13, 13; F G Bateman, 'Parramatta Fight Continues' (1934) 1(5) *Australian Labor Defender* 6, 6; F G Bateman, 'Workers' Self-Defence' (1934) 1(5) *Australian Labor Defender* 12, 12.

20 *Crimes Act 1914* (Cth), s 30A.

21 The case received a comprehensive coverage in the Party's newspaper: 'Joe Shelley, Communist Organiser Gaoled' *Workers' Weekly* (Sydney), 31 January 1930, 1.

22 *Ibid.*

Shelley's testimony highlights the subtlety of the distinction between a traditional legal defence and a 'real working-class defence'. His defence was, in effect, that he did not use the words which Constable Latrobe had attributed to him. In his evidence, he explained what he was doing on the coalfields (analysing the crisis in the industry, and assisting the workers to organise to resist attacks on their wages and conditions). As a communist he had strong views on the state of the industry. He considered that 'force, violence and energy are the essence of progress and as such are necessary'.²³ He 'did not believe in individual violence, but in the organisation of workers into defence corps and volunteer armies'.²⁴ He said that in his speech he had pointed out that last time there had been a workers' demonstration at Rothbury, one worker had been killed and others wounded. This time it would be worse. He had pointed out what workers in other countries had done in such situations. He then told the court how the Party intended to wrest control of the mining industry from the owners. When he began to tell the court what had happened in Russia, the magistrate interrupted, explaining that he did not want a speech. In cross-examination, he admitted that he believed in bloodshed if that was the only means whereby the working class could achieve victory, but that whether he would urge the miners to bloodshed would depend on the resistance they encountered. He was supported by a witness who had been present at the speech and who said he had not heard Shelley used the words attributed to him.²⁵

Several constructions could be placed on that evidence. One is that while Shelley favoured the use of violence in a variety of circumstances, he did not favour the shooting of police except in collective self-defence. A statement to this effect could easily have been misinterpreted and misremembered, so that even if Constable Latrobe's memory had been reasonably sound (which was questionable), it might well be inaccurate in relation to the precise nature of what Shelley was recommending. A second is that it is quite possible that Shelley did use the language attributed to him (or, assuming Latrobe's memory to be less than perfect (as one must), words to the same effect). The language would not have been out of character. A third is that, regardless of whether he used the offending words or not, no harm would be done by treating him as if he had uttered them.

An acquittal-oriented defence might have been based on an attempt to persuade the court to accept the first interpretation. Had Shelley's aim been to maximise the likelihood of acquittal, his evidence would have taken a slightly different form. In particular, it would have been based on the assertion that Shelley regarded shooting to kill as justifiable only if this was necessary to resist police who themselves were willing (as they had been at Rothbury) to shoot even

23 Ibid.

24 Ibid.

25 Ibid.

when doing so posed a threat to human life.²⁶ Shelley's apparent unwillingness to make an unequivocal statement to this effect suggests that his strategy was indeed political rather than legal – with a slightly higher likelihood of acquittal sacrificed for the opportunity to make a political statement.

The need to make a trade-off between agitation and successful trial outcomes was ultimately dependent on the nature of the message that was to be conveyed, and on the means chosen to convey the message. If defendants wanted to argue that they were revolutionaries who were doing what they did for the sake of the revolution, they might be hard-pressed to argue that they had nonetheless acted strictly within the relevant law at all relevant times. Defendants who challenged the legitimacy of the court were likely both to alienate the court and to suggest to it that they would not be averse to giving false evidence, notwithstanding an affirmation to tell the truth. If they asserted their commitment to the destruction of the capitalist order, supporters of that order might not regard them as people of good character. Campaigns which involved magistrates and judges being bombarded with letters and telegrams were likely to be counterproductive insofar as the recipients could react angrily to the implication that they will bow to pressure and heed *ex parte* communications.²⁷ Reliance on defendants presenting their own cases may expose them to a risk of conviction which could be averted if they were to be legally represented. Defiant strategies such as refusing to be placed on a bond or refusing to pay fines usually meant serving time in prison. However the degree to which politicisation of trials conflicted with the achievement of favourable outcomes varied according to the political message the Party was trying to convey and according to its beliefs about how it might best be conveyed.

Less revolutionary messages could be more easily reconciled with the achievement of favourable outcomes. Communist commitment to revolution typically (if counter-theoretically) coexisted with commitment to the achievement of more immediate – and more generally acceptable – objectives: increases to the dole; the prevention of war; and the protection of indigent tenants from eviction by their landlords. Where defendants' immediate or ostensible objectives commanded broad support, subtle politicisation of trials might have the potential to increase the likelihood of a favourable outcome – especially in the event of a jury trial. Moreover, as the Party gradually abandoned the violent rhetoric of the Depression years and moved towards the idea that revolution would come through success at the ballot box, it became better able to present itself as an intra-systemic political actor whose values were to a limited extent also the values of law and the courts.

Had conviction and draconian sentences been inevitable, communists would have had nothing to lose by running political defences, even when the Party was

26 Perhaps, too, it was unwise for Shelley to have been so frank about his and the Party's willingness to use violence. However, his openness may have served forensic purposes. By raising these matters before the prosecution could raise them in cross-examination, he was better able to place his construction on the issues, and to avoid any impression of evasiveness.

27 See, eg, the response of a magistrate to a petition from 1500 workers: 'Crown Appeals', *Workers' Weekly* (Sydney), 27 April 1934, 1, 6.

committed to the defence of violence as a necessary political tool. The need to trade off politics and favourable trial outcomes arises only where a political defence could prejudice what might otherwise be a real possibility of an acquittal or a lenient sentence. Communist propaganda – especially during the early 1930s – discounted the possibility that trials could culminate in favourable outcomes, except insofar as these were attributable to mass agitation. A 1931 *Workers' Weekly* article is illustrative:

[W]orkers are charged with numerous 'offences' and the lie manufacturers of the police department will be working overtime faking up evidence to railroad them into long terms of imprisonment ... In an effort to make Australia safe for landlords' profits, the social fascists [the Labor Party] and the capitalists will strive to have terroristic punishments imposed. In such circumstances, what means of defence have the workers at their disposal? Can we rely upon the arguments of lawyers in the courts, upon legal technicalities? Most decidedly not. When the bourgeoisie decides upon severe punishment for the workers, the most brilliant arguments of attorneys are about as effective as the chattering of sparrows on the roof. The only weapon that will make the capitalists and the social fascists pause, is the mass hostility of the workers, expressed through mass demonstrations of protest.²⁸

Subsequently, the Party came to accept that courts, and in particular legal values, could be used as weapons.²⁹ In a 1934 article in the *Australian Labor Defender*, F G Bateman noted how the judicial system's professed impartiality could be used both as a means of attacking the courts, and a means of achieving acquittals. According to Bateman, defendants should expose judicial bias by refusing to take part in the trial and by appealing. The former strategy exposes trials as charades. The latter strategy may do the same since appeal courts will bend over backwards to uphold the decision of the lower court. But, he notes, 'the court also has the function of deceiving thousands of workers into believing that, in working-class cases, unbiased judgments are given by them'. In order to maintain that illusion, it must sometimes act in an unbiased manner. Thereby 'we are able to secure the release of many of our class-war prisoners'.³⁰ In any case, the ILD knew that favourable outcomes were sometimes achievable. Defendants represented by ILD lawyers enjoyed considerable success in jury trials. In the course of the 1930s, the ILD also enjoyed a degree of success in its appeals to Supreme Courts and to the High Court. Moreover, even where conviction was almost inevitable – as was the case in lower court trials – courts rarely imposed the maximum sentence. Cases could not therefore be run on the basis that since conviction and sentence were preordained, there was no need to worry about how the conduct of a trial might impinge on its outcome.

28 'Rescue the Anti-Eviction Fighters from Capitalist Justice', *Workers' Weekly* (Sydney), 10 July 1931, 1. On the uneasy relations between the CPA, the ALP and the unions during the Depression years, see, eg, Gibson, above n 9, 49–55; Louis, above n 9, 34–7, 65–6, 84, 144, 146–7, 159–60, 162, 169, 171, 174, 182–91; Macintyre, above n 9, 153–6, 196–200.

29 The ILD enjoyed considerable success in New South Wales political cases. In 1933, there had been 93 arrests in New South Wales, with 45 sentences and 48 dismissals: 'News from Districts and Locals', above n 8, 15. In Victoria, the ILD had been less successful, with incomplete figures indicating six dismissals from 55 arrests. Of the 94 people charged with selling literature in the Sydney Domain in 1934, 35 had been tried as at July 1934, and of these only 13 were convicted: Bateman, 'ILD Fights Literature Ban', above n 8, 5.

30 Bateman, 'Parramatta Fight Continues', above n 19, 6.

Insofar as there was a conflict between agitation and the achievement of favourable outcomes, this would create a dilemma only if there were some point to achieving favourable outcomes. If, for instance, it was politically advantageous that the Party and its members be persecuted, politically-run trials might make considerable sense, notwithstanding that they meant that defendants were more likely to be convicted and imprisoned. However, while martyrs have their uses, the Party and the ILD appear to have regarded favourable outcomes as, on the whole, desirable. Acquittals could be used politically. They could be taken as evidence of what could be achieved by mass action (even if they in fact turned on narrow legal technicalities). They could be used to show that even courts regarded police as liars. They could be used to show that the state was vulnerable and incompetent. Moreover, while communists were willing to go to prison for the sake of the Party, this involved some costs to the Party as well as to the prisoners.³¹ While they were in prison, the Party was deprived of their services. The costs of assisting the families of imprisoned comrades represented a potential drain on revolutionary resources.

It may therefore be unclear what constitutes an optimal political strategy in a given political trial, and one would expect this to complicate choice of tactics. In addition, choice of trial tactics might also be expected to reflect human failings. Lawyers are likely to prefer strategies which yield favourable outcomes for their clients.³² Defendants are likely to be tempted by strategies which reduce the likelihood of imprisonment. Each, insofar as they are politically committed, might be ashamed of such temptations, but given the ambiguities surrounding political defences, lawyers and defendants could be expected to deviate from the approved ways, especially when this could arguably assist the cause.

For lawyers, there is a further potential problem, and that is the code of ethics which governs professional practice. A barrister who repeatedly used the court as a political forum, in face of demands by the magistrate or judge that submissions be kept relevant, could run the risk of being disbarred. Even a highly committed barrister might be mindful that disqualification from practice would not only deprive the barrister of a source of income, but deprive the Party of the services

31 Macintyre, above n 9, 192–4, 196.

32 Some lawyers define their role in political terms, but even politically motivated lawyers may be reluctant to subordinate political goals to 'legal' ones. In the US, International Labor Defense activists clashed over tactics. While 'movement' lawyers were sympathetic to the politicisation of litigation, they were sometimes extremely reluctant to subordinate their professional expertise to define themselves solely as political activists. They were receptive to rationalisations which justified their continuing to behave as legal professionals. Even in the late 1960s and early 1970s, the demand for lawyers willing to subordinate professionalism to ideology far outstripped their supply: Nathan Hakman, 'Political Trials in the Legal Order: A Political Scientist's Perspective' (1972) 21 *Journal of Public Law* 73, 106 (fn 109), 108–9, 110–11. Martha Minow recognised the conflict between presenting a political defence and acting in the normal lawyerly way: Martha Minow, 'Breaking the Law: Lawyers and Clients in Struggles for Social Change' (1991) 52 *University of Pittsburgh Law Review* 723, 742–3, 747–8. See Mitford, above n 3 for an example of a 'political' trial transformed by lawyers. See Malcolm Burnstein, 'Trying a Political Case' (1969) 28 *Guild Practitioner* 33 for an example of the outcome orientation of a lawyer advising about how to conduct political trials.

of one of a small number of sympathetic lawyers.³³ Such considerations did not prevent the ILD's regulars from introducing political elements into their trials. Shelley, after all, was represented. However, professional standards are likely to have constrained communists' counsel.³⁴

If the ILD had been no more than a mindless agent of the Red Aid (to which it was affiliated), it might have been expected to pursue a relatively uncritical 'labor defence' approach.³⁵ However, there were times when the ILD evidently had trouble determining what a 'labor defence' involved in practice. In 1932–34, the ILD decided that if reasonable requests for favourable procedural treatment were refused, defendants would manifest their disgust by refusing to participate any further in the trial. It was proud of the consternation this strategy created when used. However, it was severely reprimanded by the Red Aid for adopting this strategy:

In your letter [of 4 December] you quote a dialogue between the accused worker and the court authorities. Being refused a solicitor or a member of the ILD to defend him, the worker says: 'Then I refuse to take part in this one-sided trial.'

This line which is evidently approved by you shows that you have not yet begun to put in practice the methods of self-defense in court as advised by us in numerous occasions and documents, but that you do not even yet grasp the great importance and the political significance of self-defense in court.

By assuming the attitude of refusing to take part in the trial, the accused worker deliberately rejects the chance of utilising the court as a tribune from which to unmask the hypocrisy [sic] of bourgeois class justice of Dimitroff who upon being denied the defense of lawyers chosen by him, refused those offered to him by the court and conducted in such a genial and superb manner his own defense.

The question of legal defense has always been a weak point of your Section and we have on several occasions pointed out your errors and deficiencies in this phase of your work. Besides this there is the resolution of our World Congress on Legal Defense which sums up in a thorough and clear form our whole viewpoint in this matter.³⁶

Willingness to challenge the legitimacy of the legal system did not necessarily mean that one would do it in the approved manner.

Moreover, the ILD appears to have displayed a somewhat casual attitude towards instructions from the Red Aid. The files of the Attorney-General's

33 See, eg. David Sternberg, 'The New Radical-Criminal Trials: A Step Toward a Class-For-Itself in the American Proletariat' 36 (1972) *Science and Society* 274, 293. Despite his enthusiasm for the lawyer-assisted, radicalised trials of the late 1960s, Sternberg doubted that there would be an adequate supply of lawyers to ensure that they could continue. In 1930s Australia, the ILD relied largely on non-communist barristers.

34 They certainly seem to have constrained Mr Best, a Victorian barrister. When his client persisted in a statement accusing the police of perjury and drunkenness, after having been ordered by the magistrate to stop, Best sought leave to withdraw from the case. He was asked to continue: 'Communists Fined', *Argus* (Melbourne), 18 November 1932, 4. He was not a newcomer to political cases, having been briefed by an ICWPA solicitor on a previous occasion: 'Mass Action Wins', *Workers' Weekly* (Sydney), 23 October 1931, 3.

35 It would still have been open to defendants who chose not to be associated with the ILD to pursue alternative approaches.

36 National Archives of Australia: Attorney-General's Department; A4671/1, Attorney-General: Special Correspondence Files 1905–51; Bundle 89/SF42/1 Reports of the Investigation Branch of the Attorney-General re Subversive Organisations and their Propaganda Material.

Department contain copies of reproachful letters from the Executive Committee of Red Aid to its delinquent Australian section, demanding to know why no-one had bothered to reply to its letters or even acknowledge them. It criticised the ILD for its failure to supply information.³⁷ It also criticised its trial strategies, especially the ILD's reliance on expensive legal representation. The ILD was obviously sensitive about this latter issue. On 21 January 1933, its National Committee reported to the English Section of the Red Aid on a number of cases it had recently handled:

These cases have gained for us a great deal of experience, as hither-to committees set up for the organising of the defence of these comrades have been turned into merely transmission belts for collecting money from the sympathetic workers and then handing it over to the legal sharks. From now on this will be certainly eradicated.³⁸

However, the Executive Committee of Red Aid doubted this:

The EC of the Red Aid notes the impermissible expenditure of 200 pounds (in the Tighes Hill case) in payment to a lawyer for legal services. This fact reveals that legalism is still strong in the Section. Such practice cuts across the mass-defense practice of the Red Aid. We note the self-criticism on this point in the conference resolution. However, we wish to stress most emphatically the need for the Australian section to overcome the existing legalism in the shortest possible time. Highly paid lawyers must be supplanted by attorneys willing to aid the ILD, free of charge, on the basis of their sincere sympathy with the workers' defense struggles ... Self-defense must be widely popularised with Comrade Dimitroff's brilliant self-defense in the Leipzig trial as the classic example of effectiveness, both in exposing the accusers and forcing an acquittal. Above all mass support of the workers on trial must be built around each case ...³⁹

In a sense, the Red Aid's concerns seem well-founded, for, as we shall see, the ILD did tend to rely heavily on legalistic arguments, developed by its small band of sympathetic barristers (often Clive Evatt, and usually briefed by the indefatigable communist solicitor, Christian Jollie Smith). However, the letter skates over the question of where the ILD was to find its hitherto untapped supply of altruistic lawyers. Its reference to Dimitrov⁴⁰ is unhelpful, whether one

37 Ibid.

38 Ibid.

39 Ibid.

40 George Dimitrov (or 'Dimitroff', to use the transliteration favoured by the ILD and Red Aid), a Bulgarian communist who later became Secretary-General of the Comintern, was one of five defendants charged in Germany in connection with the 1933 Reichstag fire. There was nothing to link him with the fire, and the prosecution case against him and three of his four codefendants was grotesquely threadbare. Refusing to be cowed by the prosecution and a patently partial judge, he presented his defence so effectively that dispassionate observers had little doubt as to his innocence. Most came to accept that the Nazis were responsible for the fire. They certainly used it as the pretext for a merciless assault on their enemies. Dimitrov's case also gelled with an extra-curial international campaign on his (and his codefendants') behalf, orchestrated by the international communist movement. Eventually an embarrassed prosecution dropped the charges against him, and he and his codefendants were later allowed to leave Germany for the Soviet Union. Dimitrov's prestige was such that he survived the purges of the late 1930s and the purges which swept Eastern Europe in the final years of Stalin's reign. His two fellow Bulgarians disappeared in the late 1930s. For accounts of the trial, see Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (1991) 27–35; Stephen Koch, *Double Lives* (1995) 97–124. Ironically the judicial farce in this case seems to have produced the correct result. The only defendant to be convicted was van der Lubbe, the mentally unstable Dutch ex-communist who seems to have set the fire.

treats the trial at face value⁴¹ or as a bilaterally staged show trial.⁴² The brilliance of Dimitrov's performance was attributable to the fact that the performance of the prosecution and (on the whole) the court constituted such a fundamental violation of ordinary principles of legality that defiance was bound to make Dimitrov a hero among those who respected law and democracy – and even among those who did not. Furthermore, his acquittal seems largely attributable to the prosecution's inability to produce evidence of either his guilt or of that of his three communist codefendants. Impressive as it was, the Dimitrov precedent had little to offer defendants facing resist arrest charges before the Paddington Police Court, and defendants acted accordingly.

Whether represented by the ILD or not, Australian political defendants tended to pursue a carefully balanced strategy involving elements of worker's self-defence and attempts to maximise the likelihood of favourable outcomes. Self-defence strategies were more likely to be used where there was little chance of outcomes being influenced and where the stakes were small in lower courts. Legalistic strategies were more likely to be found in cases where the stakes were high, as in higher courts. The appeal system was used strategically so that relatively political first instance defences could be followed by relatively legalistic appeals on questions of law and de novo.

B Political Defences

Some leftist defendants, particularly in lower courts, did attempt to pursue a political defence. Shelley was far more frank than most defendants about his willingness to countenance the use of force for political and industrial purposes. Bill Orr, charged in similar circumstances at Cessnock, also used the occasion of his trial to denounce the use of the police in industrial disputes, stating that police were under instructions to shoot into crowds if this was necessary to break them up. He too was willing to admit that as a communist, he believed in gaining his objectives by force if necessary.⁴³ Most defendants did not so avowedly defend political violence, but defendants nonetheless did their political duty, asserting their beliefs, notwithstanding that it could only prejudice their prospects.⁴⁴ They sometimes avowed their communist allegiance, and sought to present their political views to the court.⁴⁵ They insisted on making affirmations rather than giving evidence on oath. Phillip Bossone, charged with sedition, represented

41 See, eg. Müller, above n 40, 27–35. Müller considers that the prosecution conducted the trial so incompetently that the acquittal of Dimitrov and his three innocent codefendants became necessary if the Nazis were to defend themselves against charges that their accession to power was illegal.

42 François Furet, *The Passing of an Illusion: The Idea of Communism in the Twentieth Century* (1999) 217–18; Stephen Koch, above n 40, 97–124.

43 'Frame-Up Fails', *Workers' Weekly* (Sydney), 7 March 1930, 1.

44 Lawrence Mahoney, who when asked if he had been a continual nuisance while he was in Darwin said, 'I was fighting for my class' and when asked whether he was a communist said, 'I am, and proud of it': 'Unemployed Demonstration', *Sydney Morning Herald* (Sydney), 7 April 1933, 6. See also the comments of George Martin (also known as McPhee): 'Communist Activity', *Argus* (Melbourne), 2 December 1930, 3.

45 Geoffrey Bolton, *A Fine Country to Starve In* (1994) 156; 'Jack Hitchen Fined', *Workers' Weekly* (Sydney), 25 April 1930, 4; 'Communist Imprisoned', *Argus* (Melbourne), 4 July 1931, 19.

himself in the best revolutionary tradition. He took issue with police evidence in relation to precisely what he had said, and pointed out that if he had used inflammatory language, this should not necessarily be taken literally. However, he did not resile from his views, stating that:

If it is a crime to tell what I believe to be the truth about the present system of society, with its misery and destitution, then I will be proud to be a criminal all my life ... My only crime is to condemn with all my energy, and with my life, if necessary, this abominable system of capitalist society. I am not thinking of myself in this hour of accusation. My heart is with my class – with the misery and degradation of their lives. It is ridiculous to contend that if I said 'to hell with the gentlemen of the jury' that I would wish you to be sent to hell, and if I did say 'to hell with the King,' and I do remember saying that, I would not want to send the King to hell. He is not a financial magnate. As for the Red flag, it is a symbol of the working class. My offence, if any, is political, not criminal.⁴⁶

Communist defendants often highlighted the darker side of law and order. For example, when asked whether he believed in constituted law and order, James McPhee retorted '[t]he sort of order that batons miners and the murder of Norman Brown?'.⁴⁷ Communists denied the legitimacy of capitalist justice. The courts were capitalists' courts, and the police were 'ignorant of working-class understanding'.⁴⁸ Police were regularly accused of perjury and brutality (and there sometimes appear to have been good grounds for these accusations).⁴⁹

Communists also challenged the legitimacy of the courts. In 1930, Bert Moxon (then the leader of the Party) 'told the court that justice was unknown there, and invited the lackeys of capitalism to carry on with their job of executing capitalist vengeance on militant workers'.⁵⁰ The court heeded this plea in aggravation and imposed a sentence of 14 days for contempt.⁵¹ In the committal hearing of ten activists charged with falsely imprisoning the administrator of the Northern Territory, the defendants objected to the matter being heard by Stipendiary Magistrate Playford on the grounds that he was a subordinate official and brother

46 'Communist Charged', *Sydney Morning Herald* (Sydney), 23 July 1930, 17.

47 'Unlawful Procession', *Sydney Morning Herald* (Sydney), 21 March 1930, 7.

48 Ibid. See also Bill Laidlaw on police: "'Tools of the Master Class'", *Workers' Weekly* (Sydney), 31 January 1930, 1.

49 On balance, it is impossible to ascertain the truth of such charges, especially 70 years after the event. However, evidence of police perjury is considerable. For example, a magistrate found proven a charge of insulting language, brought by Jollie Smith against Sergeant Toohey, notwithstanding evidence from Inspector Mackay and Sergeants Lendrum and Toohey that they did not use the words alleged: 'Mackay Is Not Believed', *Workers' Weekly* (Sydney), 31 January 1930, 1. In another case, evidence from police witnesses placed the same defendant at two different places simultaneously: 'Rafferty's Rules for Police', *Workers' Weekly* (Sydney), 31 January 1930, 1. See also Constable Latrobe's remarkable memory: 'Joe Shelley, Communist Organiser Gaoled', above n 21, 1. In another example of a superb memory which failed in court, a police witness could not even remember the first question asked by the solicitor: 'Police All Out to Secure Conviction', *Workers' Weekly* (Sydney), 6 October 1933, 4. In the quarter sessions trial of defendants arrested for their alleged involvement in resisting attempted eviction in Newtown (Sydney), cross-examination of the Newtown Station Sergeant elicited the statement that '[i]f ... the accused were batoned or beaten at the station after arrest, I would not admit it': 'Jury Disagrees', *Workers' Weekly* (Sydney), 18 September 1931, 1. Is this evidence of police willingness to lie, or of remarkable honesty, or both?

50 'Recent Sydney Victims of the Class War', *Workers' Weekly* (Sydney), 12 December 1930, 2.

51 Ibid; 'Communist Sent to Gaol', *Argus* (Melbourne), 6 December 1930, 24.

officer of the informant, and had at times acted as the informant himself. The submission seems to have been successful. Another magistrate handled the adjourned hearing.⁵² Defendants charged before Stipendiary Magistrate Chapman in relation to their involvement in a Bulli riot all asked to have the matter tried before another magistrate, alleging that Chapman was biased.⁵³ In a Lithgow trial, the barrister retained by the ILD protested that in cases arising out of industrial conflicts, magistrates believed the police regardless of the evidence in favour of the defendants.⁵⁴ At Parramatta, following a number of trials involving disputes about police evidence, the ILD solicitor argued that the magistrate was biased, as he was a public servant, like the allegedly assaulted officer. Further, it was claimed that bias existed by virtue of the day-to-day contact between the magistrate and the officer.⁵⁵

However, even during the Party's militant phase, the ICWPA and the ILD usually ran trials along relatively conventional, rather than strictly radical political, lines. Jury trials were run semi-politically. In trials arising out of the anti-eviction campaigns of 1931–32, the defence sought, inter alia, to show that the defendants had been engaged in an attempt to resist unreasonable attempts to dislodge tenants from their homes. In the quarter sessions trial of defendants arrested for their role in the Newtown eviction clashes, Clive Evatt told the jury that if the critics of communism knew more about it, they might well be of a different mind.⁵⁶ But the political appeals were largely tailored to the politics of jurors. The defendants' conduct was presented not as that of revolutionaries but as that of ordinary working class Australians who were coming to the assistance of people threatened with eviction from their homes. The defence case was not that the defendants were entitled to use all necessary force to resist the police but that they had not done what the police alleged they had done. It was counsel who ran the trial and not the defendants.

Cases in which there had been violent clashes between police and communist protesters also tended not to be run on the basis that revolutionary violence was noble, but on the basis that such violence as had taken place had been a response to vicious police attacks.⁵⁷ Defendants in such cases were usually unrepresented, and sometimes used colourful (and hyperbolic) language in their defence. However, it was the language of indignation rather than defiance.⁵⁸ If defendants

52 'Police Court', *Northern Territory Times* (Darwin), 16 May 1930, 3; 'Police Court', *Northern Territory Times* (Darwin), 23 May 1930, 1.

53 'Bulli Riots', *Sydney Morning Herald* (Sydney), 15 October 1931, 7.

54 "'Useless to Plead,' Defendants Declare", *Workers' Weekly* (Sydney), 9 December 1932, 1.

55 Bateman, 'Parramatta Fight Continues', above n 19, 6.

56 The reports are contained in 'Heroic Newtown Fighters on Trial', *Workers' Weekly* (Sydney), 11 September 1931, 1, 4; 'Jury Disagrees', above n 49, 1, 4.

57 See, eg, 'Assaults on Police', *Sydney Morning Herald* (Sydney), 12 May 1931, 5 (Lawrie Gardiner, Alex Lynch); 'Insulted the Police', *Sydney Morning Herald* (Sydney), 10 June 1931, 7 (T Bell); 'Bankstown Riot', *Sydney Morning Herald* 19 June 1931, 14 (Oliver Griffin); 'Quarter Sessions', *Sydney Morning Herald* (Sydney), 13 November 1931, 6 (the Bankstown anti-eviction case).

58 Sometimes the language was colourful. Bowles (who had served at Gallipoli and throughout the war) said he had never seen anything as brutal as the police action. Another accused in the Bankstown anti-eviction case stated that police had behaved 'like fiends incarnate' and that men came out of the house 'with heads like bullocks' livers': 'Quarter Sessions', above n 57, 6.

had made use of their trials to develop revolutionary themes, one can assume that the *Workers' Weekly* would have highlighted this. Yet most references to trials make no reference to revolutionary political defences, and most suggest that the defence was a simple 'I didn't do it' defence. Additionally, defendants and their supporters generally seem to have behaved themselves in court. Of the 600 or so leftist defendants in my sample who were tried between 1930–32, only three were punished for contempt of court.⁵⁹

However, the Party seems to have been satisfied with the way defences were run. Bossone was required to give an explanation for agreeing to release on a good behaviour bond after being convicted of uttering seditious words. Dr Gerald O'Day was also criticised. As a defence to a charge of using insulting words, he was supposed to have alleged police thuggery. For failing to do so, he was disciplined. He subsequently confessed to the sins of individualism, right opportunism and being undisciplined.⁶⁰ However, these are the only such cases I have found.

The Party's enthusiasm for violent confrontations was short-lived. By 1932, it was shifting towards a civil type of disobedience. Confrontations tended to arise from union activity and from attempts to stage and address outdoor meetings. Courts continued to be used as political forums, but the message gradually changed. One still encounters examples of uncompromising political defences, but these tend to be defences of militancy rather than defences of revolutionary violence. Instead of occasionally revelling in the status of troublemaker, defendants sought to attach the label to their adversaries. Defences were political, but tended to appeal to such liberal principles as equality before the law and the importance of freedom of speech.

Even during the Party's most militant years during the early '30s, leftist defendants had emphasised the degree to which their arrests reflected discriminatory law enforcement. This theme was developed throughout the decade. Frederick Partridge, charged on several occasions with obstruction, questioned police witnesses about whether they were part of a special 'communist squad', and whether they would have stopped a meeting he was addressing if it had been a religious meeting. He declared that the prosecution was political, and that he was simply exercising his right as a worker to address other workers.⁶¹ Complaints about denial of the right to free speech became an increasingly dominant theme in political cases in the mid-1930s. Noel Cunningham (Counihan) used his trial to highlight the absurdity of Chief Commissioner Blamey's ban on street meetings, using cross-examination to extract the concession that his address to the crowd (from a barred cage on a

59 See below 61.

60 Macintyre, above n 9, 207, 233. Macintyre refers to Bossone as having been 'scalded' in the Party media, but the coverage of his case in the *Workers' Weekly* is not unduly critical. It includes a statement of apology by Bossone who says he misunderstood the implications of a bond, and a far more trenchant piece of self-criticism by the No 3 District for its failure to provide adequate support to Bossone in his trials: 'Alleged Sedition', *Workers' Weekly* (Sydney), 3 October 1930, 2.

61 'Communist Candidate', *Argus* (Melbourne), 9 December 1931, 8; 'Communist in Court', *Argus* (Melbourne), 11 January 1933, 11.

horsedrawn cart) had caused no disruption to traffic. He then told the court why he had done what he did.⁶²

Defendants charged as part of the long-running campaign to be allowed to solicit funds and distribute literature in the Sydney Domain regularly used their court appearances to condemn the ban on such activities.⁶³ Lawrence Mahoney argued that he was prosecuted for selling the *Workers' Weekly* only because it was a communist paper.⁶⁴ V Rossiter, a member of the National Committee of the ILD, even succeeded in extracting an admission that 'shorthand notes were only taken at meetings of the Party and the ILD and that other meetings [at the Sydney Domain] were freely allowed to take up collections'.⁶⁵ Defendants charged with distributing leaflets opposing the government's recruiting campaign used the occasion to point out that the government had also distributed leaflets and that many of these were left lying round littering the streets. In contrast, they said, people pocketed the communist leaflets and took them home.⁶⁶

By 1934, the *Workers' Weekly* was drawing considerable satisfaction from successful conventional defences.⁶⁷ Egon Kisch was amused rather than appalled by the care taken by his counsel, A B Piddington KC, to strip his High Court habeas corpus application of any political implications, observing that:

It is true, however, that he does not look upon the case in the way our man [Kisch] wishes it be seen. Old Piddington wants to draw a sharp distinction between our man and Griffin, whose illegal return to Australia was not the behaviour of a gentleman. He wants our man to emphasise the non-political character of his journey. Old Piddington shudders at the thought that our man's lily-white escutcheon might forever be sullied by an Australian prison sentence.⁶⁸

Challenges to the authority of the courts continued, but they tended to be more subtle. By the mid-1930s, Stan Moran – probably the most frequently arrested communist in the history of the Party in Australia⁶⁹ – was regularly using a sophisticated version of the labor defence. Sometimes he attacked the courts for their lack of impartiality, but – more subversively – he also attacked the authority

62 'Speech from Steel Cage', *Herald* (Melbourne) 22 May 1933, 10.

63 'Accused Stir Court Over Ban', *Workers' Weekly* (Sydney), 25 May 1937, 3.

64 "'No Politics," Says Magistrate', *Workers' Weekly* (Sydney), 22 May 1936, 4.

65 'ILD Leader in Court', *Workers' Weekly* (Sydney), 8 September 1936, 4. He was sentenced to a fine of 2/6, which suggests that the magistrate was sympathetic to his argument.

66 'Eleven Men Fined for Opposing War', *Workers' Weekly* (Sydney), 11 September 1936, 3.

67 When Jean Devanny was arrested for offences allegedly committed on 11 March 1934, no adjournments were sought. On 17 March, she appeared at the Central Court, represented by an ILD solicitor. Her defence was the straightforward, legal defence that the police evidence was unreliable and contradictory. She had not, as alleged, incited a person to resist arrest. She had therefore not committed an offence. Attempts to arrest her were therefore illegal, and those making those attempts were not acting in the course of their duties. She was therefore not guilty of the offence of assaulting police. This defence was accepted. The magistrate observed that he did not understand why the arrest was made, and the whole thing seemed very childish. The *Workers' Weekly* report placed a gloss on the case: it had been Devanny who had been assaulted, and money was sought to finance the prosecution of the police involved: "'No Reason for Arrest'", *Workers' Weekly* (Sydney), 20 April 1934, 1.

68 Egon Erwin Kisch, *Australian Landfall* (1937) 64.

69 He was proud of having logged up 37 convictions in the course of the campaign against the prohibition on money-raising in the Sydney Domain, and he mentions other convictions in his autobiography: see Stan Moran, *Autobiography of a Rebel* (1999) 45, see also 9, 21, 22, 24, 27, 56, 62. My sample includes 13 of his appearances.

of the courts by violating tactic courtroom norms and by treating proceedings as something of a joke.⁷⁰ Moran seems to have been the exception, however. It is rare to find reports of other defendants displaying Moran's quick-witted impertinence.

Political purity was particularly likely to be sacrificed when cases were taken to the higher courts and this was the case throughout the 1930s. In some appeals, legal technicalities were relied on shamelessly and skilfully. Among the cases generated by disorder in the Cessnock area were *Ex parte Aubin*; *Re Munday*⁷¹ and *Munday v Gill*.⁷² At first instance, the case against Aubin was tried first. Aubin was convicted of criminal intimidation under the *Crimes Act 1900* (NSW) s 545C(1). Counsel for the remaining defendants agreed to the informations against them being heard separately, and to the use as evidence of depositions by the two police witnesses who had given evidence in Aubin's case. Aubin then appealed, contending that the offence of intimidation required proof of particular acts by particular people which had the effect of intimidating particular people.⁷³ This appeal failed. The remaining defendants then appealed, arguing that the magistrate did not have the power to take the course of action that the defendants had consented to in the lower court. This argument turned on the rules of criminal procedure relating to the circumstances where defendants charged in separate informations could be tried separately. The New South Wales Supreme Court ruled that the magistrate lacked jurisdiction, the defendants' consent being irrelevant. The High Court, by majority, ruled that the magistrate had erred, but the error was 'cured' by the defendants' consent.⁷⁴

The successful appeal against the initial convictions in quarter session trial of defendants arrested for their role in the Bankstown eviction clashes ultimately turned on the question of whether the correct procedure had been followed in assembling the jury.⁷⁵ In *R v Banks*⁷⁶ a person convicted of distributing a pamphlet that did not contain the printer's name and address argued successfully that the relevant legislation (the *Printing Act 1899* (NSW)) applied only to pamphlets produced by moveable type, and not to roneoed publications. The issue of whether publications might be sold in the Sydney Domain was argued on the basis of the meaning to be given to the legislation under which the relevant regulation had purportedly been made.⁷⁷ The Victorian case of *Delmenico v Marusich*⁷⁸ turned on whether a defendant to a vagrancy charge had to prove both that his means of support were lawful and that they were sufficient.

70 'Accused Stir Court Over Ban', above n 63, 3; "'Orford Strike" in Court', *Workers' Weekly* (Sydney), 14 January 1938, 1.

71 (1930) 30 SR (NSW) 169 (Full Court).

72 (1930) 44 CLR 38.

73 *Ex parte Aubin*; *Re Munday* (1930) 30 SR (NSW) 169 (Full Court).

74 *Munday v Gill* (1930) 44 CLR 38.

75 *R v Corbett* (1931) 32 SR (NSW) 93; *Corbett v The King* (1932) 47 CLR 317. The case involved other issues, particularly the question of whether the eviction notice was valid, but it was on the basis of the improperly constituted jury that the matter was sent for retrial.

76 (1932) 32 SR (NSW) 516 (Full Court).

77 *Ex parte Cottman*; *Re McKinnon* (1934) 35 SR (NSW) 7.

78 [1931] VR 158.

Importantly, the litigation surrounding the attempts to exclude Kisch from Australia was conducted on relatively conventional lines in the Court of Petty Sessions, and was run on strictly legal lines before the High Court. Argument in *R v Wilson; Ex parte Kisch* ('Kisch')⁷⁹ was concerned largely with whether Scots Gaelic was a European language for the purposes of the *Immigration Act 1901* (Cth). *R v Fletcher; Ex parte Kisch*⁸⁰ involved the question of what needed to be demonstrated in order to make out an action for contempt of court. Furthermore, *R v Carter; Ex parte Kisch*⁸¹ turned on questions relating to the kind of evidence needed to demonstrate that a declaration had been made that a person was, in the Minister's opinion, an undesirable visitor, and that this conclusion was based on an official communication from a Dominion or foreign government. Argument in these cases sometimes involved reference to political issues, but it did not bear the slightest resemblance to proletarian self-defence.⁸²

The contrast between (semi-) politicised lower court cases and 'legalistic' appeals was consistent with Bateman's 1934 analysis. Nonetheless, it highlights the dilemma facing political defendants. The rationality of appeals is predicated upon the assumption that substantively favourable outcomes matter, are achievable, and would be imperilled by a political defence. If this is so, politicisation at first instance may also prove costly.

C Using Procedure Strategically

The ICPWA, the ILD and the Party were sensitive to the uses that could be made of criminal procedure, although they were not always quite sure of what constituted the best strategy. In early 1930, the ICWPA expressed indignation that a magistrate had refused to impose an immediate gaol sentence in default. It was obvious that the authorities were not going to allow defendants 'to fill the gaols, thereby increasing the financial burdens of the governments'. They 'will hold the sentences over the heads of the victims until it suits the bosses to make mass arrests'.⁸³ By contrast, four years later, the ILD advised defendants who were fined to seek time to pay, 'in order to make necessary arrangements before going to gaol'. Moreover (like the ICPWA before it), it was aware that delay would prove advantageous. Governments could sometimes be persuaded to waive fines.⁸⁴ But all agreed that strategy mattered, even if not on how.

79 (1934) 52 CLR 234.

80 (1935) 52 CLR 248.

81 (1934) 52 CLR 221.

82 Christian Jollie Smith acted for each of the appellants and for Kisch in his applications. Herbert Evatt (who was appointed to the High Court in December 1930) and Clancy acted as counsel for the Cessnock appellants, Bradley and Dwyer for Banks, and Sugerman for Cottman. A B Piddington KC represented Kisch.

83 'Terrorism on the Coalfields', above n 8, 1.

84 Bateman, 'Workers' Self-Defence', above n 19, 12. As early as 1930, approaches were made to the Victorian Chief Secretary to request the waiving of a fine which had been imposed for the use of words which insulted the Chief Secretary: 'Remission of Fines Sought', *Argus* (Melbourne), 4 November 1930, 8. The insult is reported in 'Yarra Bank Speeches', *Argus* (Melbourne), 3 November 1930, 7. Such approaches had some success. An approach to the Victorian Labor Government yielded an agreement to defer action to enforce the default sentences, but action was taken when the extended time for payment

Strategy also underlay the way in which the ILD handled *Hush v Devanny*,⁸⁵ which potentially involved the question of whether the CPA was an unlawful association under Part IIA of the *Crimes Act 1914* (Cth). The prosecution had relied on a procedure whereby averments enjoyed the status of *prima facie* evidence. If the matters averred in the information had been sufficient to ground a conviction, Harold Devanny could be convicted unless he gave evidence to rebut the presumption created by the averments.

There were three possible defences open to Devanny. The first was that the relevant legislation was unconstitutional. The second was that the prosecution evidence and the averments did not sustain the charge. The third would have involved the giving of evidence to rebut the presumption created by the averments. The problem for Devanny was that the first defence might well fail. If it did, his acquittal would be dependent on establishing one of the other defences. If he relied solely on the second defence, it was possible that he would be convicted notwithstanding that there was evidence he could have produced in rebuttal. If he relied on the third defence, there was a danger that the prosecution would elicit by cross-examination evidence to fill gaps left by the averments. If there were to be a finding of fact based on a thorough canvassing of the evidence (as distinct from one based on the averments), there would be the danger that the High Court's attitude to the legislation would be coloured accordingly, and that a challenge to the validity of the averment provision would be dismissed as irrelevant.

A strategy was adopted whereby Devanny was to rely on the first and second defences before the magistrate. Having been convicted, Devanny then appealed to the High Court on questions of law, and to quarter sessions for a trial *de novo*. The High Court appeal trial was heard first.⁸⁶ The appeal was allowed on the basis that the information was improperly drafted, and the averments insufficient to prove the elements of the offence. Devanny did not have to run the risk that, in giving evidence to rebut the matters alleged in the averments, he might have been able to give the prosecution the material it needed to fill the gaps in its case. In the event of his losing in the High Court, he would still have been able to seek acquittal on the facts at quarter sessions. This was not a 'proletarian self-defence' – it was good tactics.

elapsed: 'Fines Unpaid', *Argus* (Melbourne), 1 January 1931, 7. In 1933, the (conservative) Argyle Government remitted some of the fines imposed on participants in the Brunswick free speech movement, after it had amended the law which had criminalised their behaviour: see Victorian Public Records Office: VPRS 1746 Item 24, Brunswick Court of Petty Sessions Police/Arrest Register.

85 (Unreported, Sydney Central Police Court, Chief Stipendiary Magistrate Laidlaw, 25 October 1932). A transcript is available at National Archives of Australia: Office of Deputy Crown Solicitor, New South Wales Branch; SP185/1, Correspondence on Common Law Matters, 1908–49; 20199, Box 172. An appeal to the High Court was heard under the name of *R v Hush; Ex parte Devanny* (1932) 48 CLR 487. The defendant, Harold Devanny, was publisher of the *Workers' Weekly* and husband of Jean Devanny, novelist and activist who was also arrested on a number of occasions.

86 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487.

Even routine political cases were fought with far more tenacity than their typically apolitical analogues. Defendants almost invariably pleaded not guilty.⁸⁷ While defendants charged with related offences sometimes agreed to be tried jointly,⁸⁸ there were cases where such defendants insisted that they each be tried separately.⁸⁹ In the jury trials of defendants charged with causing wilful damage in the course of anti-eviction protests, Clive Evatt (for the defendants) made full use of the defendants' rights to challenge prospective jurors. Since each defendant had a number of challenges, they possessed dozens of challenges between them. Even given the vicissitudes of juror selection, Evatt was in a good position to ensure that the jury as eventually constituted would be reasonably sympathetic to the defendants. In the first Bankstown eviction case, 73 potential jurors out of a panel of 96 were pre-emptively challenged.⁹⁰ In the trial of defendants charged in relation to the Tighe's Hill (Newcastle) evictions, the accused challenged 119 jurors before a jury was finally assembled.⁹¹ Evatt also managed to prolong the retrial (in which most of his expenses were to be paid by the New South Wales government) so that it stretched over 62 days.⁹² The moral to State governments was clear: trying leftists could prove extremely expensive.

Communist defences reflected the Party's recognition that trials can be used politically, and the declining use of revolutionary rhetoric by defendants reflects the Party's shift from strategies based on appealing to revolutionary sentiments, to strategies based on seeking support from potential non-communist sympathisers. But political defences coexisted with restraint and with recognition of the tactical uses of law. While trials were occasionally accompanied by rowdiness, they never seem to have been accompanied by attempts to disrupt proceedings. Important trials were invariably run by lawyers rather than by defendants, and while lawyers were prepared to allow a degree of politicisation, it seems to have been subordinated to forensic considerations (insofar as the two were potentially in conflict). Appeals were predicated on the assumption that law could be used by defendants, and on the assumption that it could be best used if legal forms were unambiguously observed.

87 Examples of guilty pleas were rare. They include the cases of Reeves, who was convicted of addressing a meeting without the City Council's permission: 'Hyde Park Meeting', *Sydney Morning Herald* (Sydney), 14 February 1931, 9; and of Day (described as a communist) who pleaded guilty to stealing a machine gun: 'Machine Gun Found', *Argus* (Melbourne), 8 August 1931, 18; 'Buried Machine-Gun', *Argus* (Melbourne), 10 August 1931, 8.

88 'Unlawful Procession', *Sydney Morning Herald* (Sydney) 14 March 1930, 7; *Munday v Gill* (1930) 44 CLR 38.

89 'Communists', *Sydney Morning Herald* (Sydney), 2 June 1932, 8.

90 *Corbett v The King* (1932) 47 CLR 317, 322.

91 '288 Jurymen Called', *Sydney Morning Herald* (Sydney), 6 September 1932, 10.

92 'Eviction Retrial', *Sydney Morning Herald* (Sydney), 18 May 1933, 18; 'Tighe's Hill Case', *Sydney Morning Herald* (Sydney), 19 May 1933, 12; 'Tighe's Hill Case', *Sydney Morning Herald* (Sydney), 20 May 1933, 14.

IV POLITICISING TRIALS: PROSECUTORS

The dangers that are inherent in full-blown political defences are highlighted by the fact that prosecutors evidently considered that it was to their advantage to highlight defendants' politics. Bill Orr, tried on a charge of inciting to murder, was asked why he had made an affirmation rather than swearing on the Bible, whether he was a communist and whether he was loyal to the King.⁹³ Frederick Wills, who was being tried for participating in an unlawful procession, made an affirmation. He was questioned not only about whether he believed in God, but about whether he was a communist, whether he believed in the Union Jack and the Australian flag, and whether he believed in law and order.⁹⁴ In his trial for assaulting police, Williams was questioned about the Workers' Defence Army, his role in it, its mode of operation, and his role in organising a gang during the timber strike of 1929.⁹⁵ Walter McGee, charged with insulting language, was asked whether he was a communist.⁹⁶

The *Workers' Weekly* reported that in the Sydney trials of people arrested for offences allegedly committed in the course of a series of demonstrations in late 1930, every effort 'was made to prove, or where proof was not possible to infer, that the defendants or the witnesses were members of the Communist Party'.⁹⁷ There are numerous other reports of cases in which defendants were asked whether they were communists.⁹⁸ Evidently, prosecutors considered that it was to their advantage to establish the political allegiances of communists.

Defendants generally did not object to this line of questioning. In one exception, Linda Mountjoy objected to evidence being given that she was 'the leader of a lot of men who call themselves Communist', declaring that '[i]t does not matter whether I am a Communist or a Nationalist'.⁹⁹ Three years later, H Buckley also objected to a question about his politics on the grounds that his answer could be used against him in the event of a prosecution under the *Crimes Act 1914* (Cth).¹⁰⁰ In the 1937 trial of the protesters who had been urging a boycott of Japanese goods in protest against the Japanese invasion of China, the defendants unsuccessfully objected to questions about their politics.¹⁰¹ When challenged, prosecutors argued that the defendant's politics was relevant to the offence as communists were more intensely committed to their cause, and therefore more willing to manifest this in unlawful behaviour.

93 'Frame-Up Fails', above n 43, 1.

94 He did not, at least not law and order in its current state: 'Unlawful Procession', above n 88, 7.

95 'Organiser Fined', *Sydney Morning Herald* (Sydney), 19 August 1930, 11.

96 He replied 'I was not yesterday, but I am today': 'Bankstown Riot', above n 57, 14.

97 'Recent Sydney Victims of the Class War', above n 50, 2.

98 These include the trials of the Clovelly anti-eviction defendants: 'Lamaro's Attack on Hunger Strikers', *Workers' Weekly* (Sydney), 12 December 1930, 2; of Moran (for obstructing police): 'Bound Over', *Sydney Morning Herald* (Sydney), 7 April 1933, 6; and of a number of defendants charged in relation to a 1937 'boycott Japan' protest: 'Called for Boycott', *Workers' Weekly* (Sydney), 19 October 1937, 3.

99 'Communists', *Sydney Morning Herald* (Sydney), 10 November 1931, 6.

100 Bateman, 'Parramatta Fight Continues', above n 19, 6. See also Bateman, 'Workers' Self-Defence', above n 19, 12, which warns defendants of the need to object to prejudicial and irrelevant material.

101 'Called for Boycott', above n 98, 3.

Typically, however, prosecutors made no reference to why it should be relevant that a person was a communist, and rarely sought to adduce evidence about communist practices other than those represented by the behaviour which constituted the basis for the charge or charges against the defendant. The exceptions included a handful of Victorian vagrancy cases, in which evidence of police questioning included allegations that the defendant and his associates had engaged in activities including unlawful drilling, violence, espionage, and preparations for revolution – evidence which was of questionable relevance.¹⁰²

In most cases, however, the stories about communism seem to have been incidental to proof of the prosecution charges, and seem to have been constrained by considerations of legal relevance. Legalism, again, triumphed over politics.

V COURTS

Political trials can pose major problems for courts. They reduce the magistrate's capacity to control proceedings, since defendants may be able to achieve some of their objectives regardless of what the magistrate does. Crowds are even less easily controlled than defendants. The use of contempt powers is an unsatisfactory response as this can imply an admission of lost authority, while failure to use them may result in a loss of control. Transformation of a case into a political trial removes it from the magistrate's area of expertise. Challenges to the court's authority by defendants may pose problems for magistrates who feel both angry at the defendants' defiance, and constrained by the duty to act fairly.

As such, magistrates had little time for the political views of defendants.¹⁰³ In many examples, magistrates adopted the approach of simply stating that such were irrelevant, and left it at that. This had the advantage of shifting the definition of the issue back to the magistrate's area of expertise. Police Magistrate Stafford adopted this approach after two defendants to a trespass charge explained, in the best proletarian defence tradition, that they were on railway premises to unify the working class and they had a right to address railway employees. His response was simple: 'We are not concerned with what you were trying to teach. You had no right to be on that property without permission'.¹⁰⁴ He then offered the defendants a six month good behaviour bond, a sentence close to the bottom of the Victorian sentencing scale.¹⁰⁵

102 These included the cases of Martin (alias McPhee): 'Communist Activity', above n 44, 3; and those of Mitchem: 'Communist Activities', *Argus* (Melbourne), 24 January 1931, 18; of Gus Masurich and John Baines: 'Communist Party', *Argus* (Melbourne), 4 March 1931, 14. See also the case of Marusich (the *Argus* report spells the defendant's name as Merusich), in which the police admitted in cross-examination that the defendant's association with members of the CPA who were 'suspicious and convicted persons' was not of an unlawful nature or for an unlawful purpose: *Delmenico v Marusich* [1931] VLR 158, 160.

103 Ralph Gibson (who was arrested on at least ten occasions) wrote that in his experience, 'if you want to say anything political you have to compress it into two or three short sentences which are the most a magistrate will let you deliver': Gibson, above n 9, 325.

104 'Communist Speakers', *Argus* (Melbourne), 1 December 1931, 11.

105 *Ibid.*

Similarly, Police Magistrate Freeman replied to a defendant's observation that his behaviour was not offensive to the working class by stating that the court was not concerned with politics and the defendant must not mention such things.¹⁰⁶ When a defendant questioned a police witness about whether he was being prosecuted because he was selling *Workers' Weekly*, Stipendiary Magistrate Stevenson objected: 'I can't allow politics to be brought into court, it makes no difference if you were selling the "Sun" or the "Herald"'.¹⁰⁷ In another case Stipendiary Magistrate Stevenson disallowed one defendant's evidence that he had walked past many policemen and was arrested only when he passed one who was known to be particularly vicious towards workers, especially members of the Party. Stipendiary Magistrate Stevenson stated vehemently that '[t]he only thing that matters are the facts of the case'.¹⁰⁸ In response to a claim by Moran that he was imposing capitalist law, Stipendiary Magistrate Reed replied that Moran was in a country in which everyone must obey the law, with courts existing 'for the purpose of hearing both sides'.¹⁰⁹

Other magistrates sought to take issue with the substance of defendants' submissions. A magistrate at Glebe said that he was sorry for a young defendant who made an affirmation on the grounds that 'no-one with any common sense believed in the Bible'.¹¹⁰ Magistrate McMahon condemned the views about law and order expressed by Wills (a defendant), declaring that 'the laws were made by the people, and if people didn't like them, they could work for change'.¹¹¹ He deplored the fact that a young woman should say she did not believe in 'this law and order', and then be stupid enough to go to jail rather than pay a small fine.¹¹² Stipendiary Magistrate Fletcher expressed similar views in the context of the trial of Robert Pinkner for offences arising out of a failed attempt to disrupt an All for Australia League meeting when he stated:

I cannot understand what you men expect to gain by this ... If you adopted constitutional means you might have your grievances remedied; but in this country you are going the wrong way about doing anything to help yourselves or those you set yourselves out to represent.¹¹³

Police Magistrate Bond felt the need to take issue with a claim by Leonard Varty that the police had framed him for taking part in a demonstration, and that the constable had committed perjury, observing that '[p]ossibly you will call on the police one of these days to save yourself from being cracked over the head.'¹¹⁴

Sometimes magistrates took the opportunity of a trial to condemn communists and communism. 'I don't know whether you young people are the tools of others

106 'Communists Fined', above n 34, 4.

107 "'No Politics", says Magistrate', above n 64, 4.

108 'Called for Boycott', above n 98, 3.

109 'Communist Fined', *Sydney Morning Herald* (Sydney), 12 January 1938, 10.

110 'Severe Sentences at Glebe', *Workers' Weekly* (Sydney), 9 May 1930, 2.

111 'Unlawful Procession', above n 88, 7.

112 'After the Procession', *Sydney Morning Herald* (Sydney), 15 March 1930, 12.

113 'Communist Riot', *Sydney Morning Herald* (Sydney), 13 May 1931, 8.

114 'Police Insulted', *Argus* (Melbourne), 10 May 1930, 26. The defendant's name is given as 'Barty' in the *Argus* report, but he is referred to as 'Varty' in 'Varty Arrested in Melbourne', *Workers' Weekly* (Sydney), 9 May 1930, 1.

higher up in regard to these Communistic ideas',¹¹⁵ said Stipendiary Magistrate Fletcher, drawing on the familiar theme of leftist activists as dupes. But, as if to contradict the implication, he proceeded to sentence the defendant concerned to relatively lengthy prison terms.¹¹⁶ In John Boyle's case, police evidence asserted that he lived at Communist Hall. Sentencing him on a vagrancy charge, Magistrate MacDougall commented: 'What a shame! A returned man like you coming from the country and getting contaminated with all this rubbish'.¹¹⁷ However, he was sympathetic to the defendant, accepting his evidence that he was looking for work but was unable to find it, in preference to that of the police.¹¹⁸ When defendants in a Bankstown free speech case sought to make speeches about class-conscious activities in Europe, Stipendiary Magistrate Nott said that he 'did not want to hear anything about that tripe'.¹¹⁹

However, these hostile remarks are largely drawn from the turbulent Depression years. In several cases later in the decade, there are hints that some magistrates were perhaps sympathetic to arguments about the unfairness of discriminatory law enforcement. A magistrate, who tried defendants accused of distributing anti-war leaflets, responded to their argument that the military had also created litter by suggesting that the defendant could 'take out a summons against the military and I will give them the same treatment as I am giving you'.¹²⁰ The *Workers' Weekly* was sceptical, but the magistrate's statement tacitly conceded the defendant's point.¹²¹ Stipendiary Magistrate Stevenson's claim that it did not matter what newspaper was being sold could also be taken as implying that prosecutions should not be based on this consideration. In a further example, there was a suggestive exchange of views between Lawrence Mahoney and the magistrate who was trying him for soliciting funds in the Domain. When Mahoney asked the magistrate what he thought of the by-law banning the taking of collections in the Domain, the magistrate replied: 'There are a number of by-laws that we have to administer which we may not sympathise with'.¹²² 'Why don't you stop this persecution of the Communist Party?' Mahoney asked.¹²³ 'I can't prevent that' was the reply.¹²⁴

Occasionally, magistrates even seem to have been impressed by the substantive content of a defendant's politics. Moran reports that after his 1937 arrest for activities in relation to an anti-war march, he 'decided to do a Dimitrov' and gave a 'great anti-war speech' which made a big impact on the

115 'Assaults on Police', above n 57, 5.

116 *Ibid.*

117 'Communists Charged', *Sydney Morning Herald* (Sydney), 9 August 1930, 12.

118 *Ibid.* The police claimed that he had admitted getting meals by going into restaurants and then running away without paying. He also discharged Fairfax. The police had stated that Fairfax had said he would not work until after the Revolution. Fairfax denied this and said he had some casual work. Magistrate MacDougall gave him the benefit of the doubt.

119 'Communists', above n 89, 8.

120 'Eleven Men Fined for Opposing War', above n 66, 3.

121 *Ibid.*

122 'Accused Stir Court Over Ban', above n 63, 3.

123 *Ibid.*

124 *Ibid.*

magistrate, who fined him only 2/6.¹²⁵ Moran seems to have reciprocated this concession – he thought that he actually paid that fine.¹²⁶

However, the reasons given by magistrates for sentences suggest a desire to depoliticise cases. Behaviour was characterised by reference to its non-political features. Dr O'Day, shortly to be reprimanded by his party for bourgeois deviationism, was reprimanded by the bench for deviation from bourgeois conventions:

We think you might have avoided coarse language in your address. You are a man of education, whereas some persons might be excused by their ignorance for using language of that kind. The bench thinks that you would be wise hereafter if you elect to speak on these subjects, to modify your language.¹²⁷

While magistrates were hostile to attempts to turn trials into occasions for making political statements, they were sparing in their use of the contempt power. In a trial in Darwin in 1930, Mahoney told Stipendiary Magistrate Playford that he was not going to answer any more questions from the prosecution about his character, and that Playford 'ought to wake up to it as it was an attempt to bring up his past life'.¹²⁸ Playford said he had never been so grossly insulted in his official capacity and that he would deal drastically with such conduct in the future. However, he did not commit Mahoney.¹²⁹ Moran was allowed to get away with answering back and with treating proceedings light-heartedly.¹³⁰

The few defendants who were committed for contempt include Preston (7 days imprisonment for asking a police witness whether he had his bludgeon with him on the day of the alleged offence), Moxon (14 days),¹³¹ and C Kelso (fined £1 for contempt after the courtroom audience burst into laughter when the prosecutor described himself as a friend of the workers).¹³² Bill Cottman who, in the course of an altercation with the magistrate, told him that if he knew so much about the case he should get into the witness box and give evidence himself, was likewise convicted of contempt.¹³³

Courts normally convicted, but there was a marked difference between magistrates and juries. Of defendants charged in the lower courts, 90.1 per cent were convicted on one or more counts. Only 5 per cent were acquitted, and charges were withdrawn against another 4.6 per cent. Of those tried before juries,

125 Moran, above n 69, 56.

126 Ibid.

127 'Doctor in Court', *Argus* (Melbourne), 3 December 1932, 23. See also the remarks of Police Magistrate Brown when he sentenced Cunningham (Counihan) for his role in the Brunswick Free Speech campaign: 'You are above the average intelligence. Nevertheless law and order should not be defied. You should be assisting law and order': 'Speech from Steel Cage', above n 62, 10.

128 'Darwin Police Court', *Northern Territory Times* (Darwin), 9 May 1930, 1.

129 Ibid.

130 I think this is a tribute both to Moran's skill in skating on rather thin ice and to the good sense of the magistrates.

131 'Recent Sydney Victims of the Class War', above n 50, 2 (for details of both Preston and Moxon). Moxon's case was also mentioned in the non-communist press: 'Communist Sent to Gaol', above n 51, 24.

132 'Class Justice in Wollongong', *Workers' Weekly* (Sydney), 22 January 1932, 4.

133 'Cottman is Sentenced for Contempt of Court', *Workers' Weekly* (Sydney), 25 January 1935, 6.

39 per cent were finally convicted, and 32 per cent were finally acquitted (sometimes after a second trial). In 28 per cent of cases, there was a hung jury and the government decided against further prosecutions.

Sentences for those convicted ranged from the trivial to the severe. The available evidence is sparse. Nonetheless, several generalisations can be made. Of those for whom details of sentence are available, 10.6 per cent were convicted and discharged or released on good behaviour bonds. Fines were imposed on 70.9 per cent of these defendants and 18.5 per cent received prison sentences. Of the 120 defendants who received prison terms, 25 had been given the option of being bound over, and had refused. Fines, in one sense, were typically small. More than half (52 per cent) were for sums of £2 or less, and only 11 per cent of fines exceeded £10. In some cases, fines were so small as to suggest that the court had some sympathy for the defendant.¹³⁴ In other cases, while fines were small, their impact could be severe. For the unemployed, they represented an effective prison sentence unless the defendant could somehow raise the money required. In any case, the Party expected that if its members were fined, they should serve prison time in default when the conviction related to collective political or industrial action. Custodial sentences were normally short. In my sample, the median term was a little under two months. Only 11.5 per cent of those sentenced to imprisonment received sentences of 12 months or more.

Sentences were, to a considerable extent, determined on the basis of legally relevant variables. An important determinant of sentence was charge severity. Of those tried and convicted in the higher courts, more than half received custodial sentences, and trials on indictment accounted for all the sentences of 12 months or more. Of those tried in the lower courts, 18 per cent received custodial sentences. Of those convicted of violence and resisting police, 43 per cent received custodial sentences. An even higher proportion of the small number convicted of malicious damage were imprisoned, the high rate of imprisonment reflecting the use of this charge in one of the bitterly fought eviction cases. Of those convicted for participating in illegal demonstrations and for street offences, only 7.1 per cent and 5.9 per cent received prison sentences. Those convicted of leafleting and bill-posting all received fines. A similar (but slightly weaker) relationship is to be found in the sub-set of defendants who were tried summarily.¹³⁵ Size of fine was also related to offence category, fines being relatively light for those convicted of leafleting, public order, and unlawful demonstration offences, but heavier for those convicted of resisting arrest and assault.¹³⁶

134 The smallest fines were the one shilling fines imposed on Paddington free speech protesters after police and protesters had reached an amicable settlement. Several of the defendants charged with the Domain soliciting/leaflet offences were fined as little as 2/6 or 5/-.

135 Apart from the gravity of the offence, the other variable that normally bears a strong relationship to sentence is prior record. Details of this variable were almost never reported. A crude measure of prior record was calculated, based on the number of prior convictions in my sample of cases. This variable bore virtually no relationship to sentence. This may either be because prior record was unrelated to sentence, or because (if it was) my measure was too flawed to reflect such a relationship.

136 Again, the measure of prior convictions is unrelated to fine.

Only a handful of cases found their way to appeal. Details of appeals to quarter sessions where defendants were tried *de novo* are sparse, but the law reports yield some examples of cases that proceeded to the Supreme and High Courts. The judgment in *Munday v Gill* shows that the High Court was fully aware of the context of the dispute, but interpreted it as an industrial dispute, and not as an industrial dispute in which there had been communist involvement. The case turned largely on procedural issues. The closest one gets to value judgments is in the joint judgment of Gavan Duffy CJ and Starke J, who endorsed the New South Wales Chief Justice's criticisms of defendants who first agreed to a particular procedure and then sought to have decisions made on the basis of that procedure set aside on the grounds that it was irregular.¹³⁷

Judgments in these cases sometimes show awareness of the context in which the cases arose, but it is rare to find even a hint that the rationale for decisions might be other than legal. The appeals in the Bankstown eviction cases involved several issues, including whether a warrant to evict was valid at the time the police had attempted to enforce it, and whether proper procedures had been used to select the jury in the case. Both the Supreme Court¹³⁸ and the High Court¹³⁹ rejected claims that the police were not entitled to execute the warrant. While Evatt J in the High Court dissented on this issue, the other dissident was Starke J who loathed Evatt J and whose dissent could in no way be attributed to shared political beliefs. On the question of jury selection in the Supreme Court, Street CJ made clear his distaste for the procedures whereby the defendants had strung out the selection process:

What was done suggests that it was not done in *bona fide* exercise of the right given by the *Jury Act*, but was done for the purpose of delaying and obstructing the administration of justice. I hope that such an exhibition of what the learned Chairman called gross folly will not be seen again in our Courts.¹⁴⁰

Both the Supreme Court and the High Court regarded the process used to empanel the jury as fundamentally flawed, so that a new trial was necessary. In *R v Banks*, the Supreme Court found that roneoed pamphlets were not covered by the *Printing Act 1899* (NSW), but it based its decision not on arguments grounded in a presumption in favour of freedom of the press, but on a strict application of principles of statutory interpretation. The decision in *Delmenico v Marusich* is plausibly presented as the result of an attempt to make sense of a slightly ambiguous statutory provision, and as the outcome of conventional principles governing appeals based on findings of fact, and appeals against sentence.

*R v Hush; Ex parte Devanny*¹⁴¹ potentially involved fundamental issues, including whether the CPA was an unlawful association, and, if so, whether the relevant legislation was within the power of the Commonwealth. The High Court resolved it on the more mundane grounds that the averments and the evidence in

137 *Munday v Gill* (1930) 44 CLR 30.

138 *R v Corbett* (1931) 32 SR (NSW) 93.

139 *Corbett v The King* (1932) 47 CLR 317.

140 *R v Corbett* (1931) 32 SR (NSW) 93, 97–8.

141 (1932) 48 CLR 487.

the case were insufficient to find that Devanny had solicited funds for an unlawful association. Only Evatt J adverted to the constitutional issues, doubting the validity of the legislation. Dixon J seemed to have a suspicion that the cause for which Devanny had solicited funds probably was a communist cause, but based his decision on the grounds that the evidence before the court was insufficient to warrant such a finding. The ongoing conflict over the right to sell literature in the Domain found its way to the New South Wales Supreme Court on a writ of prohibition, taken out by Cottman who had received a prison sentence for resisting arrest.¹⁴² Chief Justice Jordan's judgment is the kind one would expect of an accomplished equity lawyer: terse, replete with citations, and a first-rate statement of the relevant law. The closest he comes to an explicit value judgment is contained in his conclusion that the by-law prohibited types of activity 'which are inherently likely to lead to the annoyance and disturbance of the public in their enjoyment of the park'.¹⁴³ It is a statement about parks and commercial transactions in general. It treats as legally irrelevant the fact that the Domain was not like other parks, and the sales that the communists sought to make were unlike other sales.

The Kisch-Griffin litigation in the High Court also suggests that the Court was determined that a political issue should be handled as a legal one. The judgments in *Kisch* do not refer to why Kisch wanted to come to Australia, nor to the circumstances in which he arrived.¹⁴⁴ The decision turns solely on the meaning of the term 'European language' in the context of the *Immigration Act 1901* (Cth). The decision was not even predicated on whether it was an abuse of this legislation to test a person in a language that they were likely to fail. Indeed, there was not the slightest suggestion in Griffin's case that there was any impropriety in examining a New Zealander in Dutch.¹⁴⁵ Griffin's successful appeal was justified on the grounds that having been charged under one section of the *Immigration Act 1901* (Cth), he was convicted on the basis of averments which were evidence only in relation to charges under another section. This was not a case of politics being concealed by reasoning. It was a unanimous decision in which Rich J (who had dissented in *R v Hush; Ex parte Devanny*) and Starke J (who had dissented in *Kisch*) were in agreement with Evatt and McTiernan J as to both outcome and reasoning. If communists sought to transform court cases into politics, courts (and those arguing before them) translated questions of politics into questions of law.

142 *Ex parte Cottman; Re McKinnon* (1934) 35 SR (NSW) 7.

143 *Ibid* 12.

144 De-contextualisation is even to be found in the summary of facts in the official report. Kisch, who famously broke his leg jumping off the ship at Port Melbourne in a desperate attempt to overcome his exclusion, is described merely as having 'met with an injury to one of his legs': *Kisch* (1934) 52 CLR 234, 235.

145 *Griffin v Wilson* (1935) 52 CLR 260.

VI WHO WINS IN POLITICAL CASES?

The problem with the politicisation of trials is that it is not clear who benefits. The official party line was that there was a correct way of running a political defence. Despite the Party's confidence that trials could be used politically, it was not always clear how this could best be done. Complicating the politicisation of trials was the fact that the Party's capacity to maintain control over the meaning of trials was strictly limited. The actual audience for any trial was necessarily small. If the wider public was to be informed about trials, it would be through the press. Both the capitalist and the communist press provided a degree of coverage of political trials, but coverage was typically slight. In 1932, a year in which the ILD claimed there were 250 comrades serving sentences in New South Wales prisons, the *Workers' Weekly* provides details of only about 20 cases decided in that year, although its coverage of cases in 1930 and 1931 seems more comprehensive. Overall, between 1930–39, the *Workers' Weekly* gave details of about 449 cases. To the annoyance of the *Workers' Weekly*, the capitalist newspapers sometimes failed to report well-staged political cases, even when their reporters had been present.¹⁴⁶ However, the *Sydney Morning Herald* was almost as diligent as the *Workers' Weekly*. It reported 337 cases (105 of which were also reported by the *Workers' Weekly*) and the Melbourne *Argus* reported 110 cases (of which 52 were also reported by the *Workers' Weekly*).¹⁴⁷

Almost 100 of the cases in the sample appear only because they left some trace in accessible government archives. Many cases were doomed to live on only in the uncertain memories of the handful of people who watched them. Reports by the capitalist press could also be unsympathetic: 'Unlawful Procession. Another Participant Fined. Strange Views on Law and Order' said one *Sydney Morning Herald* headline.¹⁴⁸ The *Sydney Morning Herald* report of Moran's trial for riotous behaviour noted Moran's claims that he had been arrested because he was fighting for better conditions for the workers. But it also mentioned the prosecution claim that the inflammatory nature of his language was partly attributable to the fact that some of the workers he was addressing were under the influence of alcohol, and it did not report Moran's quick-witted subversion of court conventions.¹⁴⁹ Sometimes press accounts of trials did not even refer to the fact that leftist defendants had been involved.¹⁵⁰

In any case, the impact of reports was dependent on the way in which their audience processed them, and this was largely beyond the control of defendants.

146 'Eleven Men Fined for Opposing War', above n 66, 3.

147 There seem to have been far fewer political trials in Melbourne, where the Party was much weaker.

148 'Unlawful Procession', above n 47, 7.

149 'Communist Fined', above n 109, 10.

150 See, eg, 'Domain Speaker Fined', *Sydney Morning Herald* (Sydney), 3 August 1939, 11. The reason for believing that it was in fact a leftist defendant who was involved is that an almost identical (and contrived) attempt to solicit funds without expressly asking for them is reported in 'Accused Stir Court Over Ban', above n 63, 3.

Stalin's carefully staged show trials impressed the faithful,¹⁵¹ but they also came to symbolise the Stalinist state's contempt for truth, and indeed, its contempt for its audience.¹⁵² Dimitrov's case demonstrates how a case can begin as a communist triumph and end in the hands of revisionists as a symbol of connivance between the two great dictators.¹⁵³ Locally, Shelley's case highlights the problems facing a political defendant. It was an exemplary defence, if the object of the defence was to highlight the Party's willingness to resort to violence in defence of workers' rights. While it may have impressed those of its audience who relished the thought of violence against those responsible for their appalling working conditions, it may also have confirmed the worst fears of those who regarded communists as dangerous revolutionaries. While communists sometimes proudly proclaimed their politics, the fact that prosecutors also drew attention to their communist allegiances suggests that they considered that they could gain by mobilising negative images of communists and communism. Conversely, while O'Day's lapse from party discipline did not impress the Party, it may have persuaded some readers of the *Argus* that not all communists were police-hating thugs.

Problems may even have arisen from the widely used argument that the state's discriminatory practices were at variance with the liberal values in terms of which it sought to base its legitimacy. This was an argument that seems to have resonated with at least some magistrates, but it was a double-edged argument. If states could be condemned for their illiberalism, it was arguable that particularly illiberal states were particularly worthy of condemnation. So long as Stalin was regarded as a benign and liberal leader, the CPA had nothing to fear from this argument, but this image of Stalin was not widely shared.

Whatever the propaganda value of political trials, it is likely that politicisation often served to reduce the costs of trials to defendants, and to increase the costs to the state. The role of the ILD in preparing defendants for their court appearances meant that these were likely to be less terrifying than the typical defendant's appearance. Successful articulation of a political message could give defendants a sense of empowerment normally denied to defendants. The mobilisation of crowds of sympathisers meant that, unlike most defendants, political defendants often performed before a sympathetic audience. Reports of the Party in the media provided positive reinforcement to those who had been tried and not found wanting. Politicisation also meant that the impact of sanctions was likely to be attenuated. Even if punishment meant imprisonment, the rigours of imprisonment could be reduced by the presence of other comrades in gaol and by the financial support the ICWPA and the ILD provided to prisoners' families.

151 On their reception, see Carmichael, above n 12, 58–9, 93–4, 125–6. The degree to which they were treated in the West as a triumph of due process is testimony to the degree to which credulity can triumph over evidence and common sense when the credulous have good political and psychological grounds for their credulity.

152 See Carmichael, above n 12, 59–60 who reports that after the first show trial in August 1936, there had been some expressions of sympathy for the defendants based on what they had allegedly conspired to do, and some concern that the trial had put the idea of terrorism into the minds of some of those who were discontented with the regime. See Skvorecky, above n 4, for interpretations of the postwar trials.

153 See Furet, above n 42, 217–18; Koch, above n 40, 97–122.

Celebrations to welcome prisoners home after their release served to remind them that their sentence was a badge of honour rather than cause for shame.

It is hard to know what the state gained from the trials of the 1930s, and it is arguable that benefits were achieved only at some cost. Trials require the use of scarce police and courtroom resources. This was particularly so in the case of lengthy political trials. The imposition of sanctions normally meant additional costs to the state. Moreover, political trials required trade-offs. The high acquittal rate in jury trials meant that governments had to decide which they preferred: a low probability of conviction, accompanied by the possibility of lengthy sentences, or a high probability of conviction and relatively lenient sentences. After 1932, governments opted for the latter. This probably made sense in terms of general deterrence. It also made political sense, for light sentences reduced the likelihood of defendants becoming martyrs. While sympathy for communism was limited, this lack of sympathy did not necessarily mean support for heavy penalties for those involved in communist-supported activities.

What did the state get in exchange for its prosecutions? It may have achieved a degree of general deterrence in relation to people who, while sympathetic to leftist causes, were reluctant to expose themselves to the risks of fines and imprisonment. It may even have achieved a degree of deterrence in relation to communists, for while communists often showed their contempt for the threat of imprisonment by their refusal to agree to bonds or fines, even committed communists sometimes balked at submitting to imprisonment. Shelley finally opted to agree to release on a bond to be of good behaviour, rather than continue serving the default prison term.¹⁵⁴ Jean Devanny, whose courage and devotion to the Party was unquestionable, served several prison terms, but when faced with the prospect of another, 'dreaded the thought of it'. When next convicted, the Party paid her fine.¹⁵⁵

The imposition of penalties may also have reassured police that their work was valued by the courts and by the broader society. Stories of prosecutions may have bolstered public order by persuading the public that all was well – the state was responding to the threat posed by its communist enemies. Even this consideration became less important as the Party became less militant, and as it became increasingly apparent that the social status quo was going to survive the Depression. By the late 1930s, a combination of declining party militancy and growing government tolerance of communist activities was being reflected in a sharp decline in the rate of prosecutions.

Courts probably had the easiest role. Defendants rarely attempted to disrupt courts and, overall, seemed willing to act as if they accepted the courts' authority. Acting as decision makers, bound by the law, saved judges and magistrates from the need to justify their actions by reference to non-legal criteria. Overall, courts asserted their obligation to be bound by the law and justified their decisions by reference to legal criteria. However, the exceptions deserve comment. Some

154 'Schelley Released', *Sydney Morning Herald* (Sydney), 16 January 1932, 12. In spelling his name 'Shelley', I have followed the practice in the *Workers' Weekly*. Macintyre, above n 9, 480 also favours this spelling.

155 Macintyre, above n 9, 217.

magistrates showed that they were fully aware of the fact that they were dealing with communists, and they made their disapproval of communism clear to those in court, especially between 1930 and 1932. They evidently saw no conflict between the expression of political sentiments and the performance of their judicial functions. Magistrates' objections to communism seem in part to have been based on the assumption that communism rejected capitalist law, and the assumption was not altogether without foundation. As communists' approach to law changed, so, it seems, did magistrates' attitudes to communism.

Higher courts generally kept their politics to themselves, although Justice Evatt's judgment in *R v Hush; Ex parte Devanny* contains an impressively perceptive analysis of the ambiguity surrounding the CPA's ostensible commitment to revolution.¹⁵⁶ Dixon J showed an admirable capacity to subordinate his well-founded suspicions to the rigours of the law.

Overt legalism may sometimes have coexisted with a conscious or semi-conscious willingness to take defendants' politics into account. If this was so (and it probably was), the effects of this bias do not seem to have been particularly strong. Custodial sentences were the exception, and were generally short. Fines were rarely heavy (although in practice they were probably beyond the means of many defendants). In the absence of comparable data about non-political defendants charged with similar offences, it is difficult to know whether offenders were discriminated against because of their politics, but if there was discrimination, it does not seem to have been particularly severe.¹⁵⁷ In behaving as they did, courts were implicitly (and occasionally explicitly) challenging the communist story of class-based law enforcement.

VII CONCLUSION

Despite the Party's recognition of the theatrical uses of trials, almost none of the trials discussed above managed to capture the public imagination. If Dimitrov's case was the example to be followed, the CPA's essays at politicisation were dismal failures, achieving neither notoriety nor – on the whole – forensic success. The reasons for this failure suggest that there are limitations on the degree to which cases can be successfully politicised. First, politicisation

¹⁵⁶ Ted Hill describes the analysis as 'distorted': E F Hill, *Communism and Australia: Reflections and Reminiscences* (1989) 14. However, his analysis of the CPA's deviation from the 'true' path suggests that it was also perceptive.

¹⁵⁷ Within the sample, it is possible to compare defendants who appeared to be communists with defendants whose political allegiances are not so apparent. Multivariate analyses suggest that the two groups received similar sentences, but this may simply reflect the fact that both groups were arrested in relation to what could be described as 'communist' activity. It may also reflect the fact that the information which was the basis for my classification is likely to have differed from the information available to the sentencing magistrate. All that one can conclude is that if there was a 'real life communist' effect, it was not strong enough to be manifested in an analysis complicated by a degree of measurement error. Counsel for Marusich argued on appeal that the six month long sentence was excessive and appeared to have been influenced by the defendant's political associations. The argument failed on the grounds that there was no evidence for this, although Marfarlan J conceded that the sentence was 'severer than I should have imposed': *Delmenico v Marusich* [1931] VLR 158, 162.

seems more likely to prove successful when prosecutors and judges depart from normal conventions, thereby helping to legitimate claims that trials are both political and illegitimate. Overall, the commitment of courts to legalism seems to have defused opportunities for 'exposing' the judicial system. Secondly, politicisation seems most likely to be successful when the trial involves the state on the one hand, and the exponent of widely-shared opposition to state policies on the other. The problem faced by the CPA was that while it sometimes supported popular causes, it never came to be seen as their embodiment. Indeed, worthwhile causes could be tarnished by their alleged association with communism. Thirdly, heroic status is bestowed on cases by history's victors, and communism has long since lost such appeal as it once had. Fourthly, politicisation may prove successful where defendants are able to persuade juries of the rightness of their cause, but prosecutors effectively precluded such appeals by largely abandoning prosecutions on indictment. Finally, cases are likely to attract attention only when the stakes are high. In the cases, mostly turning on questions of principle, the stakes were small.

It is perhaps for these reasons that the only political cases from the 1930s that are still remembered are those associated with Egon Kisch's challenge to the validity of his exclusion from Australia, particularly the challenge which arose following his failure to pass the dictation test.¹⁵⁸ The case arose from patent subterfuge: the administration of a dictation test in Scots Gaelic to a skilled linguist, by an examiner who could barely speak the language in question. It involved issues of free speech and opposition to fascism, especially given that the government's determination to exclude Kisch from Australia was in contrast with its willingness to receive and even welcome representatives from Nazi Germany. It symbolised the perennial and emotion-laden conflict between cosmopolitanism and parochialism. It was an almost unqualified symbolic victory for the left over its inept conservative adversaries.¹⁵⁹ However, the status of the Kisch litigation owes nothing to its having been run in a politicised way (since it was not), little to the reasons the courts gave for their decisions (which would have permitted his exclusion if he had failed a test in Irish Gaelic), and almost everything to the way in which significance was imposed upon it.

Broadly, the pattern set in the 1930s was to continue into the 1940s and beyond. Communist defendants continued to use trials as occasions for developing political arguments, but politics were usually subordinated to

158 It is, as far as I know, the only political litigation from the 1930s to have inspired a novel: Hasluck, above n 1. Kisch's own account was published first in German, and later in an English language edition: Kisch, above n 68. It has subsequently been reprinted with an introduction. Kisch was treated as worthy of an entry in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 396. (*R v Hush; Ex parte Devanny* (1932) 48 CLR 487 not only lacks an entry it is unmentioned.)

159 In a critical analysis of the Movement Against War and Fascism, David Rose has argued that the impact of the events surrounding the Kisch visit have been exaggerated. He argues that the fact that the government was willing to use a tactic as crude as the dictation test indicates that it suspected that the political cost would be minimal: David Rose, 'The Movement Against War and Fascism' (1980) 38 *Labour History* 76, 83. The author of the best-regarded Menzies biography takes a different view, however: A W Martin, *Robert Menzies, A Life* (1993) vol 1, 130–7.

legalism. The conduct of important cases was normally dominated by lawyers. The major exception – Kevin Healy’s defence in 1949 to a sedition charge – stands out as a tantalising example of a ‘working-class defence’ which was successful, where more legalistic defences in similar cases had failed.¹⁶⁰ The last vestige of defiance – refusal to pay fines or agree to release on bonds – became increasingly unusual, and the Party sometimes organised campaigns to ensure that fines were paid (notwithstanding that this involved the enrichment of the capitalist state). When theatrically politicised trials re-emerged in the 1960s, it was a new generation of would-be revolutionaries who were responsible.

160 Healy’s case arose out of an incident similar to that which formed the basis for the prosecution of Laurence (Lance) Sharkey, the Party’s General Secretary. Sharkey had been asked by a journalist about his reaction to a statement by the French communist leader, Maurice Thorez, to the effect that if Soviet troops entered France in pursuit of an aggressor, they would be welcomed by French workers. He had said that Australian workers would welcome Soviet troops in such circumstances, but that there was no likelihood of it happening. The Soviet Union would go to war only if attacked, and even if this happened, he could not see Australia being invaded by Soviet troops. Communists were committed to averting war, however they would use force if fascists used force to prevent Australian workers gaining power. Healy was asked to comment on Sharkey’s response, and endorsed it, but in slightly stronger language. Sharkey, (who was represented by Fred Paterson) was not called as a witness, and was convicted and sentenced (after appeals) to 18 months’ imprisonment.

Out of a mixture of choice and necessity, Healy represented himself. In an unsworn statement to the court, he argued that his prosecution was politically motivated. Otherwise, why prosecute a person for making a statement and not the newspaper that publishes it? There was no reason to expect war. War fever was a creature of the media. The Soviet Union was dedicated to peace. Since the *Charter of the United Nations* forbade aggressive war, why should workers not welcome troops entering Australia in pursuit of aggressors? War would come only if the United States and its big business supporters wanted it. They should be resisted because wars are bad for workers. After a short deliberation, the jury acquitted him: see Laurence W Maher, ‘The Use and Abuse of Sedition’ (1992) 14 *Sydney Law Review* 286, 301–3. The text of Sharkey’s alleged statement is to be found in *Sharkey v The King* (1949) 79 CLR 121, 138. Healy’s statement is reported in: ‘OK to Say This’, *Workers’ Weekly* (Sydney), 9 November 1949, 3. A copy of the text of Healy’s address to the jury is to be found in the National Library of Australia: Fitzpatrick Papers, MS 4965, 4418.