NECESSARY JUSTICE: "POLITICAL" TRIALS AND MODERN POLITICAL PHILOSOPHY

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INTRODUCTION: THE POLITICAL MORALITY OF POLITICAL TRIALS AND THE RULE OF LAW

Donald Trump's election to President of the United States for the second time in November 2024 marked the beginning of the end of a sustained effort to hold him accountable in court for conduct that many Americans viewed as criminal.[1] Trump received not only the majority of Electoral College votes but a decisive plurality of the popular vote as well.[2] At the time of the election, he had already been convicted of thirty-four felonies surrounding a complex fraud to hide the use of campaign funds for hush money to an adult film actor.[3] Prior to this conviction, the decisions of a federal special prosecutor in Washington, D.C. and a Georgia district attorney to indict Trump on charges related to the 2020 presidential election had generated a heated public debate.[4] In the wake of Trump's election, special counsel Jack Smith moved to withdraw these charges and indicated his intention to step down in the near future.[5]

At one end of the spectrum of opinion are those who see nothing questionable or unusual in such proceedings, only the normal workings of the legal process. Trump was treated as any other potential accused might be on the same facts; no one is above the law, and Trump's status as a highly controversial President and candidate for 2024 is and should

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1 *Post-Election 2024: The Future of Human Rights in the U.S.*, CARR-RYAN CTR. FOR HUM. RTS. POL'Y, HARV. KENNEDY SCH. (2025), https://www.hks.harvard.edu/centers/carr/publications/post-election-2024-future-human-rights-us [https://perma.cc/KK56-3N5W].

2 *The Electoral College*, U.S. NAT'L ARCHIVES & RECS. ADMIN. (Jan. 13, 2025) https://www.archives.gov/electoral-college/2024 [https://perma.cc/9726-2YXF]; *The American Presidency Project*, U.C. SANTA BARBARA (Dec. 31, 2024), https://www.presidency.ucsb.edu/statistics/elections/2024 [https://perma.cc/6U6P-9DGF].

3 People v. Trump, 224 N.Y.S.3d 832, 836 (N.Y. Sup. Ct. 2024).

4 Indictment, Georgia v. Trump, No. 23-sc-188947 (Ga. Super. Ct. Fulton Cnty. Aug. 14, 2023); Indictment, United States v. Trump, No. 23-cr-80101 (S.D. Fla. June 8, 2023). For the details of this, and other, criminal proceedings against Trump, see MELISSA MURRAY & ANDREW WEISSMANN, *Introduction* to THE TRUMP INDICTMENTS: THE HISTORIC CHARGING DOCUMENTS WITH COMMENTARY (2024) (providing expert commentary and primary source materials for examining the four criminal cases).

5 Pam Karlan & Richard Thompson Ford, *Special Counsel Smith's Report on Trump's Interference in the 2020 Election*, STAN. LEGAL PODCAST (Jan. 14, 2025), https://law.stanford.edu/stanford-legal-podcast/special-counsel-smiths-report-on-trumps-interference-in-the-2020-election [https://perma.cc/9NQJ-59UK].

be irrelevant to the workings of criminal justice.[6] At the other extreme, militant supporters of Trump view these upcoming trials as illegitimately political[7]—a way for Democrats to obtain partisan political advantage during an election year, possibly eliminating the Republican candidate from competition. In between, there is a range of views, either in favor of or against these trials, that take into account considerations such as the impact of the trials and the eventual outcome—whether of acquittal or of conviction—on the political fabric of American society and fundamental values such as freedom of speech and probity in public life.[8]

The democratic mandate that Trump received in November 2024 may reflect the predominance of the view that these prosecutions were inappropriately politicized—a form of "lawfare" aimed at taking judgment over Trump away from the people and giving it to the courts. Alternatively, it could be that a large percentage of American voters didn't really care if Trump is a convicted felon in New York and possibly guilty of many other offenses.[9] What, indeed, are we to make of this extraordinary episode in which criminal justice became entwined with presidential electoral politics?

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6 *See, e.g.*, Ruth Marcus, *If Trump Is Indicted for Jan. 6, It Will Be Clear Why*, WASH. POST (July 25, 2023), https://img.washingtonpost.com/opinions/2023/07/25/trump-indictment-jan-6-justice-department [https://perma.cc/JHL2-PUHT] (stating that pursuing this kind of case to protect the fundamental interests of society is simply "what prosecutors are supposed to do"); *see also* MURRAY & WEISSMAN, *supra* note 4, at xvii ("[T]he DC January 6 trial, the Georgia election interference case, and the Florida documents case all reflect charges that have a long precedent of being charged against nonpolitical actors and people who appear to far less culpable than Trump.").

7 *See, e.g.*, *'The Heart of the Matter'?*, N.Y. SUN (Aug. 2, 2023, 7:09 AM), https://www.nysun.com/article/the-heart-of-the-matter.

8 *See, e.g.*, Jack Goldsmith, *The Prosecution of Trump May Have Terrible Consequences*, N.Y. TIMES (Aug. 8, 2023), https://www.nytimes.com/2023/08/08/opinion/trump-indictment-cost-danger.html [https://perma.cc/G4KD-9JJ5]; Eric Posner, *The Perils of Putting Trump on Trial*, AUSTL. FIN. REV. (Aug. 25, 2023, 12:49 PM), https://www.afr.com/world/north-america/the-perils-of-putting-trump-on-trial-20230820-p5dxwf [https://web.archive.org/web/20230906195728/https://www.afr.com/world/north-america/the-perils-of-putting-trump-on-trial-20230820-p5dxwf]; Richard L. Hasen, *No One Is Above the Law, and That Starts with Donald Trump*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/opinion/trump-jan-6-prosecution.html [https://perma.cc/6R3H-FZLV].

9 *See* Peter Baker, *As a Felon, Trump Upends How Americans View the Presidency*, N.Y. TIMES (Jan. 10, 2025), https://www.nytimes.com/2025/01/10/us/politics/trump-felon-presidency.html [https://perma.cc/4UNS-FTBY].

This Article is based on the premise that the modern tradition of political philosophy, starting with Machiavelli, its acknowledged founder, might have something useful to say in unpacking and perhaps in resolving or at least refining the controversies over what the pundit Tina Brown calls "all the failed lawfare against Trump."[10] As John Rawls suggests concerning political philosophy in a democratic society:

> Its merit, to the extent it has any, is that by study and reflection it may elaborate deeper and more instructive conceptions of basic political ideas that help us to clarify our judgments about the institutions and policies of a democratic regime. . . . Political philosophy can only mean the tradition of political philosophy . . . texts that endure and continue to be studied . . . .[11]

In this spirit, I interrogate political philosophers in the "tradition" on the question of political trials. Without prejudice to how broadly or narrowly one should define the very notion of a political trial, my interest here is, first of all, in criminal trials of prominent and powerful political figures. The conduct charged typically involves exceeding the legal constraints on the exercise of power in a system of divided government, or even acting against the political and constitutional order as a whole (treason or insurrection). I am also interested in trials of such figures for corruption as well as trials of alleged radicals or insurrectionists in civil society. Further, my focus here is those trials that occur within a regime, not trials of officials in a predecessor regime after a fundamental political transition. Such latter trials present distinctive normative questions—victor's justice, etc.—that have been canvassed in a wide and

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10 Tina Brown, *Wrecking Balls: In Trump Season Two, Deranged Masculinity Is All the Rage*, FRESH HELL (Jan. 7, 2025), https://tinabrown.substack.com/p/wrecking-balls [https://perma.cc/3ZRD-GW3P].

11 JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 1–3 (Samuel Freeman ed., 2007). I have excluded premodern political philosophy from the scope of this Article given the main theme of the Symposium. Our own institutions and conceptions of political legitimacy are much more derived from modern political thought and history (even if modern thinkers such as Machiavelli and Montesquieu begin from a critique of older political practices). Political trials in ancient political philosophy is a worthy subject for a different Article, outside the context of the present Symposium.

philosophically rich literature on transitional justice by thinkers such as Judith Shklar,[12] Hannah Arendt,[13] and Ruti Teitel.[14]

As Ronald Dworkin wrote in a fine essay advocating nonprosecution of conscientious objectors to military service, "In the United States prosecutors have discretion whether to enforce criminal laws in particular cases. . . . This discretion is not license—we expect prosecutors to have good reasons for exercising it . . . ."[15] While some of the "good reasons" may stem from considerations internal to the demands of the legal process itself (limited resources, strength of evidence, availability and credibility of witnesses, etc.), others may be grounded in broader considerations of social and political morality. As Dworkin elaborates:

> [T]here are, at least *prima facie*, some good reasons for not prosecuting those who disobey the draft laws out of conscience. One is the obvious reason that they act out of better motives than those who break the law out of greed or a desire to subvert government. Another is the practical reason that our society suffers a loss if it punishes a group that includes . . . some of its most thoughtful and loyal citizens.[16]

Whether or not to prosecute, and whom, are not the only discretionary decisions that may engage political morality: the law as written may also afford considerable latitude concerning the severity of punishment and (even in a non-transitional context) the scope for pardons and amnesties. Again, it is worth hearing from the tradition of political philosophy about what reasons of political morality might properly guide such choices.

As this Article will explain, much of the consideration of political trials in the tradition of political philosophy revolves around questions of

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12 JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1964).

13 HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

14 RUTI TEITEL, TRANSITIONAL JUSTICE (2000); Ruti Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, 29 MICH. J. INT'L L. 49 (2007).

15 Ronald Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. REV. (June 6, 1968), https://www.nybooks.com/articles/1968/06/06/on-not-prosecuting-civil-disobedience [https://perma.cc/VS6A-HSH7].

16 *Id.*

institutional choice. These questions include what kinds of political offenses are suitable for trial before legislative bodies as opposed to courts, whether large juries or small bodies of professional judges ought to be the deciders, in what institutions to invest the power of amnesty or pardon, and so on. This is what Jeremy Waldron calls "*political* political theory."[17]

The focus on institutions in the tradition of political philosophy when it comes to political trials may be particularly helpful in sorting the normative controversies surrounding the Trump election trials, because confidence or lack thereof in our institutions is a major factor in how one comes out on the question. Are our institutions up to the task of prosecuting and trying a figure like Donald Trump other than in the disgraceful manner of a show trial or partisan political spectacle? Would such trials damage further our institutions and their legitimacy? Are these trials required if we are to protect our institutions from further erosion or subversion? By looking to the tradition of political philosophy, we are invited to compare our own institutions as they are (or the state we think they are in) with the kind of institutions that might be ideally devised to respond to the complex considerations of political morality, and political prudence, at issue with political trials.

One class of political trials that is familiar from recent experience is that of criminal trials for corruption (Netanyahu, Lula, Sarkozy, etc.).[18] Edmund Burke's opening statement in the trial of Warren Hastings, the British governor of East India is an example of a political philosopher

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17 JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS (2016). Jeremy Waldron's concept of "political political theory" emphasizes the importance of engaging directly with institutional structures and real-world political arrangements, rather than limiting analysis to abstract normative ideals. *Id.* This approach is especially relevant in examining how law and legal accountability interact with political power in democratic societies.

18 *See* Philippe Marlière, *Sarkozy's Conviction Shows, at Last, French Presidents May No Longer Be Above the Law*, GUARDIAN (Mar. 2, 2021, 2:35 PM), https://www.theguardian.com/commentisfree/2021/mar/02/sarkozys-conviction-french-presidents-no-longer-above-law-corruption-veridict [https://perma.cc/W7F6-XG2R]; Tom Ginsburg, *The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective*, 56 ISR. L. REV. 385 (2023); Luiz Guilherme Arcaro Conci, *The Lula da Silva Case: Background and the Effects of His Conviction*, 35 DPCE ONLINE 425 (2018).

articulating his views on political trials while simultaneously acting as chief prosecutor in one of them.[19]

Some political trials take the form not of criminal proceedings before judge or jury but of proceedings for impeachment, based on corruption (Hastings) or dereliction of duty (a longstanding practice in France addressed by thinkers such as Montesquieu, Guizot, and Constant, all discussed below).[20] These latter trials take place before a house or chamber of the legislature.[21] The line between political responsibility in these cases and criminal responsibility, is an important area of controversy. In the U.S. system, impeachment is for "high [c]rimes and [m]isdemeanors," yet the proceedings involve the House as prosecutor and the Senate as judge and jury.[22] This at first disturbed Tocqueville, who was influenced by Montesquieu's rule of law concern that the threat of criminal prosecution and punishment in an individual case should be separated from the politicized context of legislative action.[23] But, as Tocqueville appreciated, despite the "high crimes and misdemeanors" phraseology, the only consequence was removal from office, not criminal sanctions, and so Montesquieu's worry about a political body threatening *criminal punishment* did not apply.[24] As for the Framers, their understanding, as they expressed in *The Federalist*, was that an impeached President would be subject to further proceedings in the ordinary criminal courts for crimes as defined by statute.[25]

A different kind of political trial occurs where groups or individuals are put on trial for subverting the state through teaching a revolutionary or anticonstitutional doctrine. A basic controversy here is the

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19 *See* 1 EDMUND BURKE, THE SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE ON THE IMPEACHMENT OF WARREN HASTINGS: TO WHICH IS ADDED A SELECTION OF BURKE'S EPISTOLARY CORRESPONDENCE (1877).

20 *See* infra Section II.A.

21 THE FEDERALIST NO. 69 (Alexander Hamilton).

22 U.S. CONST. art. II, § 4; 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 105–07 (Longmans, Green & Co. 1889).

23 *See infra* Section II.A.3.

24 TOCQUEVILLE, *supra* note 22, at 105–07.

25 THE FEDERALIST NO. 69, *supra* note 21.

compatibility with liberal democratic freedoms of expression and association of this kind of prosecution, where the teaching or advocacy does not lead further to actions to overthrow the state either by violence or other extraconstitutional means. The recent use by the Trump Administration of the Immigration and Nationality Act to deport lawful U.S. residents for expressing political opinions allegedly harmful to U.S. foreign policy interests indicates the renewed relevance of this debate.[26] This Article will analyze how political philosopher Judith N. Shklar questioned the compatibility between the trials of communists in the McCarthy era and American liberal constitutional principles.[27] On the other hand, the German-Jewish refugee thinker Karl Loewenstein espoused a doctrine he called "militant democracy."[28] Loewenstein's political ideas were formed in reaction to the collapse of the Weimar Republic and the rise of fascism in 1930s Europe. He believed the emotional appeal and "thuggish tactics" of extremist groups demanded a muscular legal response to protect democratic constitutionalism, even to the extent of limiting liberal freedoms.[29] By contrast, Otto Kirchheimer, another German-Jewish refugee thinker for whom the Weimar experience was formative, warned that the courts would not likely be effective in curbing political extremism once it has taken hold.[30] He argued the judiciary, depending on their own political tendencies, might crack down on the activities of some groups they consider extreme, while turning a blind eye to the disruptions of others.[31] This could lead to an

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26 *See generally* Khalil v. Trump, No. 25-CV-01963, 2025 WL 1514713 (D.N.J. May 28, 2025). In a preliminary opinion and order related to a request for injunctive relief, a federal district judge in New Jersey held that the relevant provision of the Enemy Aliens Act is likely unconstitutionally vague. *Id.* at *8.

27 *See* SHKLAR, *supra* note 12, at 210–21.

28 Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417 (1937).

29 *See id.* at 423–24.

30 *See especially* OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS Ch. IV (Princeton Univ. Press 1961).

31 *Id.*

imbalance and illegitimacy that contributes to, rather than protects against, the destruction of the constitutional order.

I. MACHIAVELLI

In modern political philosophy, the consideration of political trials in republics or regimes of divided or limited government, naturally begins with Machiavelli. In his *Discourses on Livy* ("the *Discourses*"), Machiavelli is concerned with the problem of stability and longevity in republican government.[32] Because republics are always composed of different and potentially conflicting powers and interests, they are intrinsically volatile or unstable.[33] Machiavelli suggests that where properly institutionalized, conflict can serve the vitality and resilience of republican government, rather than undermining it.[34] This is particularly the case with the tension between the people and the elite, the nobles, or the great, which was at the center of the ancient Roman republic.[35] Ideally, the people check the ambition of the great to break free of the legal constraints of limited government; the great, in turn, smooth over the ups and downs of popular passion, stabilizing the ship of state.[36]

For Machiavelli, the ability of the people to try those who "sin in anything against the free state" was not simply one institutional means of managing class conflict for the benefit of political freedom and stability, but an *essential* one.[37] John McCormick, a contemporary political philosopher who espouses a radical populist agenda for curing the ills of today's liberal democracies, seeks to cast Machiavelli as an advocate for political trials as a desirable form of direct citizen participation in

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32 *See generally* NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY (Harvey C. Mansfield & Nathan Tarcov trans., 1996) (1531) (commenting on the first ten books of Livy's *History of Rome*).

33 *See generally* DAVID LEVY, WILY ELITES AND SPIRITED PEOPLES IN MACHIAVELLI'S REPUBLICANISM (2014).

34 *See* MACHIAVELLI, *supra* note 32, at 16–17.

35 *See id.* at 17–19.

36 *See generally* LEVY, *supra* note 33.

37 MACHIAVELLI, *supra* note 32, at 23.

governance, involving what McCormick calls "widely inclusive institutions and the entire citizenry's judgment when prosecuting political crimes."[38] The crucial passage from the *Discourses* is as follows:

> To those who are posted in a city as guard of its freedom one cannot give a more useful and necessary authority than that of being able to accuse citizens to the people, or to some magistrate or council, when they sin in anything against the free state. This order produces two very useful effects for a republic. The first is that for fear of being accused citizens do not attempt things against the state; and when attempting them, they are crushed instantly and without respect. The other is that an outlet is given by which to vent, in some mode against some citizen, those humors that grow up in cities; and when these humors do not have an outlet by which they may be vented ordinarily, they have recourse to extraordinary modes that bring a whole republic to ruin. So there is nothing that makes a republic so stable and steady as to order it in a mode so that those alternating humors that agitate it can be vented in a way ordered by the laws.[39]

The usefulness of political trials as Machiavelli articulates it here has two dimensions, neither of them directly related to the virtues of citizen participation. First, trials serve as deterrence against would-be insurrectionists or usurpers.[40] Second, the living passions of republican politics are such as to give rise naturally at times to claims of disloyalty or conspiracy against prominent citizens. If these claims are not vetted in accordance with the rule of law, they will ultimately lead to scapegoating and extralegal violence. Such violence is apt to be highly destabilizing of the polity.[41]

Machiavelli cites the example of Coriolanus, which to contemporary readers may be more familiar from Shakespeare's play of the same name

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38 John P. McCormick, *Machiavelli's Political Trials and "The Free Way of Life"*, 35 POL. THEORY 385, 386 (2007).

39 MACHIAVELLI, *supra* note 32, at 23–24.

40 *See id.* at 23.

41 *See id.* at 24.

than from Livy's account.[42] Machiavelli claims that had the tribunes not accused Coriolanus and summoned him for trial, the mob would have killed him.[43] However, on Livy's account, Coriolanus never appeared for trial, was convicted in absentia, then went into exile where he worked actively against Rome with its enemy, the Volscians.[44] According to Livy, Coriolanus's political offense was seeking to abolish the tribunate, thereby taking away the legal rights of the people to participate in control of the elites.[45] Coriolanus was extorting the people into giving up these rights by denying them necessary food.[46] If one looks at Machiavelli's use of the example of Coriolanus in light of Livy's account, it becomes quite clear that deterrence, the first purpose of political trials suggested by Machiavelli, was not fulfilled.[47] Coriolanus, in exile, was enabled to commit the arguably even worse political crime of treason against Rome.[48] As Machiavelli notes somewhat later in the *Discourses*, Coriolanus never ceased to reserve "a hostile spirit against the people."[49] One is left to wonder whether, in Coriolanus's particular case, Rome would have been more secure in the short term through the "extraordinary" means of a mob tearing Coriolanus apart.[50] But Machiavelli's greater concern may well be the long-term consequences of settling scores outside of the rule of law, more important than short-term deterrence.

Contrary to McCormick's populist reading,[51] Machiavelli never suggests that only participation by the citizenship as a whole in political

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42 *Id.*

43 *Id.*

44 *See* LIVY, THE EARLY HISTORY OF ROME 2.35 (S.P. Oakley ed., Aubrey de Sélincourt trans., Penguin Books 2002) (1960).

45 *See* MACHIAVELLI, *supra* note 32, at 24.

46 *See id.*

47 *See supra* note 40 and accompanying text.

48 *See* MACHIAVELLI, *supra* note 32, at 66.

49 *See id.*

50 *Id.* at 24.

51 *See* McCormick, *supra* note 38.

trials allows them to serve the two goals that Machiavelli identifies.[52] This is evident from the crucial passage where Machiavelli refers to the possibility of the "people" and a magistrate or council dealing with accusations without any explicit hierarchy.[53] What is crucial is that ordinary citizens make accusations against prominent citizens in a proper open legal process, rather than spreading rumors in loggias and piazzas.[54]

Machiavelli does disapprove of the judging of political offenses by very small councils or tribunals (above all, one suspects, those operating in secrecy). Machiavelli introduces the modern example of the judgment of Piero Soderini in Florence:

> [T]he incident . . . occurred entirely because in that republic there was no mode of accusation against the ambition of powerful citizens. For to accuse one powerful individual before eight judges in a republic is not enough; the judges need to be very many because the few always behave in the mode of the few.[55]

Here, though, Machiavelli's concerns are arguably not populist in nature. The eight judges he refers to are the *Otto di Guardia*, which instead of vetting in public accusations of citizens against prominent politicians, operated with its system of informers and a kind of secret police, "the mode of the few."[56] Rather than protecting republican liberty against traitors and insurrectionists, the *Otto* served the interests of the ruling elite in purging other prominent citizens from political power.[57] A trial before a much larger number of judges, based upon the publicly stated accusations of ordinary citizens rather than whispers of informers and reports of spies, would be much less likely to be an instrument of intrigue and instead serve as an antidote to it.

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52 *See supra* notes 40–41 and accompanying text.

53 MACHIAVELLI, *supra* note 32, at 24.

54 *Id.* at 27.

55 *Id.* at 25 (footnotes omitted).

56 *Id.* at 25 & n.5.

57 *See id.*

A very large number of judges does not mean, or need not mean, an assembly of the citizens as a whole. An adjudicative body only needs to be numerous enough to prevent a trial from being a cloak-and-dagger operation against an ambitious but law-abiding citizen.

Later in the *Discourses*, Machiavelli comes back to this theme in his discussion of the Venetian Republic in comparison with Florence's practice of the *Otto*:

> [T]hey created eight citizens who would fill the office of the captain. Such an order went from bad to worst, for the reasons that have been said at other times: that the few were always ministers of the few and of the most powerful. The city of Venice, which had ten citizens who could punish any citizen without appeal, guarded itself from this. Because they might not be enough to punish the powerful, although they had authority for it, they had constituted there the Forty; and more, they willed that the Council of the Pregai, which is the largest council, be able to punish them so that if an accuser is not lacking, a judge is not lacking to hold powerful men in check.[58]

Here, Machiavelli is pointing to a further consideration as to why a tribunal of few judges is not appropriate for political offenses: in the case of a powerful or influential citizen, "few" would not be *enough* to punish. The implication is that a small number of judges might fear that the powerful citizen and their supporters would target them with revenge if a guilty verdict were entered. There is safety in numbers, Machiavelli suggests, and the verdict of a larger and perhaps more diverse or representative body would be hard to pin on individual judges who could be targeted for retribution.

The case for the people judging in political trials relies on their disciplined commitment to the constitutional order and their political virtue; it is far from a self-indulgent populist exercise. In considering the case of Marcus Manlius Capitolinus, Machiavelli responds to the typical objection that the popular element tends to be fickle and inconsistent in

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58 MACHIAVELLI, *supra* note 32, at 101 (footnote omitted).

its judgment of public matters.[59] The people sent Manlius to his death for crimes against the state but then were moved to tears at losing him.[60] This caused Livy to remark that there is nothing more vain and inconstant than the multitude.[61] For Machiavelli, far from evoking how the people are incapable of sound judgment, this example shows the reverse—regardless of the benefits to themselves they had received from Manlius and their affection for him, they were quite prepared to punish him when he threatened them. As Machiavelli summarizes: "The cruelties of the multitude are against whoever they fear will seize the common good; those of a prince are against whoever he fears will seize his own good."[62] The unsaid corollary, however, is that the multitude is unlikely to condemn even a leader who resorts to criminal methods as long as they see him as serving the common good.

The right of citizens to accuse publicly and trigger the trials of prominent citizens suspected of conspiring or acting against the free republic comes with a proviso. Those who spin conspiracy theories in the shadows and cast false aspersions against such citizens are to be punished for calumny.

> [A]s much as accusations help republics, so much do calumnies hurt. Between one side and the other there is the difference that calumnies have need neither of witnesses nor of any other specific corroboration to prove them, so that everyone can be calumniated by everyone; but everyone cannot of course be accused, since accusations have need of true corroborations and of circumstances that show the truth of the accusation. Men are accused to magistrates, to peoples, to councils; they are calumniated in piazzas and in loggias. Calumny is used more where accusation is used less and where cities are less ordered to receive them. So an orderer of a republic should order that every citizen in it can accuse without any fear or without any respect;

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59 *Id.* at 115–16.

60 *See id.*

61 LIVY, *supra* note 44, at 6.7.

62 MACHIAVELLI, *supra* note 32, at 119.

> and having done this and observed it well, he should punish calumniators harshly. They cannot complain if they are punished since they have places open for hearing the accusations of him whom one has calumniated in the loggias. Where this part is not well ordered, great disorders always follow; for calumnies anger and do not punish citizens, and those angered think of getting even, hating rather than fearing the things said against them.[63]

So, open trials with witnesses and legal procedures go hand in hand with gag orders on the spread of false news in loggias and piazzas, roughly the Florentine Renaissance equivalent of social media.

II. THE FRENCH CORRECTION: MONTESQUIEU AND HIS NINETEENTH CENTURY HEIRS, CONSTANT, GUIZOT, AND TOCQUEVILLE

For classical liberalism, the seminal discussion of political trials is that of Montesquieu in *The Spirit of the Laws*.[64] Montesquieu picks up where Machiavelli left off. He says that in the matter of "crimes of lèse-majesté"[65] he "might well adopt the maxim of Machiavelli" concerning the mode of the "few."[66] (Montesquieu restates the maxim as "few are corrupted by few."[67]) But Montesquieu has an objection to the unalloyed populist version of Machiavelli's proposal for political trials, the version which McCormick identifies as the core of Machiavelli's teaching. Where the people accuse but also judge, they are both party and judge. And however much this might support political "virtue," which for Montesquieu is the principle of republicanism, there is a tension with the "civil" interest of the accused as an individual, presumably that of being

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63 *Id.* at 27.

64 *See generally* CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS, bk. VI, ch. V, at 55–57 (Lavigne, Libraire-Éditeur 1844) (1748) (translated by the author) [hereinafter MONTESQUIEU].

65 *See infra* note 84 and accompanying text.

66 MONTESQUIEU, *supra* note 64, at bk. VI, ch. V, at 55.

67 *Id.*

tried by an independent and impartial tribunal.[68] Thus, the populist variant of Machiavelli's proposal where the people judge as an assembly of the whole needs to be modified.

The spirit of what Machiavelli scholar Vickie B. Sullivan calls Montesquieu's "correction" of Machiavelli is reflected in Montesquieu's characteristic approach toward reform of political institutions[69]—institutional innovations that are desirable always also turn out to have downsides and unwanted effects that themselves require further innovation. Rather than rejecting ab initio the practices of ancient republics in trying political offenses before popular juries or assemblies, Montesquieu points out certain safeguards against the dangers of such trials.[70] One such danger, apparently, is that these assemblies may degenerate into the kind of mob justice that Machiavelli seeks to avoid through public trials in accord with legal procedures.[71] Montesquieu cites the practice of Solon, the king or executive authority in Athens to require that the council responsible for criminal trials, the Areopagus, reconsider the case if there is evidence that the accused has been convicted unjustly.[72] The logic here is that a public assembly may judge rashly because it is enflamed with anger or hatred against the accused. As Montesquieu puts it, "[I]t will be good to have some slowness in these matters, above all from the moment that the accused is detained as a prisoner, in order that the people be able to calm down and judge the matter with cool heads (*juger de sang-froid*)."[73]

Montesquieu, in the context of ancient republics, mentioned two other safeguards against the dangers of trial by popular assembly. First, Romans allowed the accused to go into exile before the judgment (in Coriolanus's case, he took the opportunity whether he was formerly

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68 *Id.* at bk. VI, ch. V, at 55–56.

69 Vickie B. Sullivan, *Against the Despotism of a Republic: Montesquieu's Correction of Machiavelli in the Name of the Security of the Individual*, 27 HIST. POL. THOUGHT 263, 285 (2006).

70 MONTESQUIEU, *supra* note 64, at bk. VI, ch. V, at 55–56.

71 *Id.* at bk. VI, ch. V, at 55–56.

72 *Id.* at bk. VI, ch. V, at 55.

73 *Id.* at bk. VI, ch. V, at 56.

allowed to flee or not).[74] Second, the Romans prohibited the confiscation by the people of property of the convict.[75] Montesquieu's praise of both these "limitations" reflects his consistent opposition to harsh and vindictive punishments. In sum, Montesquieu is not as such against judgment by popular assembly in republics, provided the people are in a calm frame of mind and that punishment does not spill over into unconstrained revenge. Moderate punishments can be effective and should not be conflated with impunity, which does increase the dangers that the state will be undermined: "[I]f one examines the causes of all those situations where the state was caught with its guard down (*tous les relâchements*) one sees that this was due to impunity in the face of crimes and not the moderation of penalties."[76] As Montesquieu will elaborate in Book XII:

> When a republic is brought to destroy those who would overturn it, one must quickly put an end to punishment and vengeance, and even rewards [presumably to those who put down the insurrection]. One cannot impose great punishments and consequently great changes, without putting in the hands of certain citizens a great power. It is thus better, in this case, to pardon a great deal rather than punish a great deal, to exile few rather than many, and not to touch property rather than confiscating it. Under the pretext of avenging the republic one establishes the tyranny of the avengers . . . . One must return as soon as possible to the ordinary course of government, where the laws protect everyone and do not put individuals in their sights.[77]

A further safeguard is to hold those who make false accusations legally accountable. While Machiavelli advocated punishing individuals who put about calumnies in loggias and piazzas at the same time as

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74 *Id.* at bk. VI, ch. V, at 55.

75 *Id.*

76 *Id.* at bk. VI, ch. XII, at 60.

77 *Id.* at bk. XII, ch. XVIII, at 138–39.

touting the value of open accusations before tribunals, Montesquieu is concerned that these latter also might be false and damaging to the political order and the rule of law.[78] Thus, in Chapter XX of Book XII—entitled *Laws Favorable to the Liberty of the Citizen in a Republic*—Montesquieu praises an apparent practice in ancient Athens that the accuser be punished with a fine in cases where less than a fifth of the assembly votes for conviction.[79] He also approves of a practice in Rome where unjust accusers are subject to public shaming.[80] Further, Montesquieu vaunts the practice of putting an accuser under guard so that they have no opportunity to corrupt the judges or the witnesses.[81] Finally, "[L]aws that permit a man to die based on the testimony of a sole witness are fatal for liberty. A witness affirming guilt and the accused denying it simply cancel each other out. It is the third that tips the scales."[82]

Like Machiavelli, Montesquieu appears to admire the ideal of citizen virtue that inspires the practice of accusations in ancient republics:

> In Rome, any citizen was allowed to accuse another. This was established in accordance with the spirit of the republic, where each citizen should have a zeal without limits for the public good, where each citizen is perceived to hold the entire justice of the patria (*tous les droits de la patrie*) in their hands.[83]

But zealousness can become overzealousness, and not all those who make accusations may do so out of these nonpartisan concerns for the public good. Montesquieu's own prescription for limited government, at least partly inspired by English constitutionalism, combines the spirit of virtue with the spirit of moderation and this is reflected in his approach to political trials.

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78 *Id.* at bk. XII, ch. XX, at 139.
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.* at bk. XII, ch. III, at 120.
83 *Id.* at bk. VI, ch. VIII, at 58.

As Montesquieu explains, political justice may become tyrannical or oppressive not only through overly harsh or broad punishments but also through vague or broad definitions or interpretations of offenses against the state such as treason (*lèse-majesté*).[84] Under the Roman emperors, any kind of criticism of or objection to their exercise of power might be treated as a crime of *lèse-majesté*.[85] This tendency far outlived imperial Rome.[86]

It is especially important to liberty not to punish mere speeches or writings as offenses of *lèse-majesté*. Only speech acts that are directly connected to the actual putting into practice of a rebellion or insurrection are properly criminal. Montesquieu draws the distinction as follows:

> The speeches that are connected to an action, take on the character of that action. Thus, a man who goes to a public place to exhort subjects to revolt becomes guilty of *lèse-majesté* because speeches are connected action and partake of it. It is in no way the speeches that one is punishing but an act that has been committed employing speeches. They do not become crimes except when they prepare, accompany, or follow a criminal act.[87]

Montesquieu, whatever his initial apparent disagreement with Machiavelli concerning popular assemblies, turns out largely to share Machiavelli's concerns regarding the "mode of the few."[88] This becomes apparent when Montesquieu returns to the theme of political trials, and politicized criminal justice more generally, in Book XI of *The Spirit of the Laws*.[89] It is in Book XI that Montesquieu formulates his definition of *political* liberty of a citizen as that "peace of mind which derives from the

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84 *Id.* at bk. XII, ch. VII, at 133.

85 *Id.* at bk. XII, ch. VIII, at 133–34.

86 *Id.* at bk. XII, ch. X, at 134 ("Henry VIII held guilty of high treason all those who predicted the death of the king. That law was certainly vague."). Montesquieu suggests that this had the perverse consequence of so intimidating Henry's doctors that they were afraid to warn him of health risks. *Id.*

87 *Id.* at bk. XII, ch. XII, at 135.

88 MACHIAVELLI, *supra* note 32, at 25.

89 *See generally*, MONTESQUIEU, *supra* note 64, at bk. XI, at 104–27.

opinion of each of their own security, and to have that liberty, the government must be such that a citizen cannot fear another citizen."[90] This definition emphasizes political liberty because it signals not only Montesquieu's concern with the civil interest of the individual, the protection of their life and liberty as a *natural person*, but also the impact of accusations and trials on the *citizen's* confidence to participate in political life, i.e., the risk of intimidation or persecution through criminal allegations. It is also in Book XI that Montesquieu presents England, a monarchy in form but with a divided government under the rule of law, as a model for political liberty superior to the republics that he and Machiavelli had studied.[91]

In turning to the example of Venice, Montesquieu follows Machiavelli in approving of the shift to a larger magistrature for trying serious crimes, the Forty, and perhaps even the involvement of the larger assembly, the Pregadi (which Machiavelli refers to as the Pregai).[92] Up to this point, Montesquieu seems at one with Machiavelli on how to address the dangers from the "mode of the few." But Montesquieu introduces an additional consideration—however numerous, these magistrates are all drawn from a single permanent legislative body, the Senate.[93]

The implication is that the Senate's manner of judging in political trials will remain in some way tainted by entrenched political interests. Instead of standing bodies, Montesquieu proposes what appear to be juries drawn from the citizenry periodically to constitute tribunals in individual cases.[94]

Montesquieu continues: "In this way, the power of judging, so terrifying among men, is not attached to a certain class (*état*), nor a certain profession, but is, so to speak, invisible and absent (*nulle*). One

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90 *Id.* at bk. XI, ch. VI, at 106.

91 *Id.* at bk. XI, ch. VI, at 108.

92 MACHIAVELLI, *supra* note 32, at 101.

93 MONTESQUIEU, *supra* note 64, at bk. XI, ch. VI, at 107.

94 *Id.* ("The power of judging should not be conferred on a permanent senate, but exercised by persons drawn from the body of the population at certain times of the year in a manner prescribed by law in order to create a tribunal that lasts only as long as necessity requires.").

does not have judges constantly before one's eyes; one fears the judiciary but not the judges."[95] Furthermore, in the case of grave charges ("grand accusations")—here Montesquieu probably means treason or assassination—"the accused in accordance with the law should choose the judges, or at least be able to recuse a large enough number that those who remain are perceived to be his choice."[96]

Montesquieu, in sum, has more common ground with Machiavelli than one would initially suppose given that the discussion of political trials in *The Spirit of the Laws* is framed as a criticism, or correction, of Machiavelli. Montesquieu, like Machiavelli, is wary of the "way of the few" and supports open trials by larger bodies, certainly larger than the *Otto* in Florence.

Indeed, as the passages just cited illustrate, Montesquieu prefers trials by bodies not dominated by entrenched elites, but which are in some way representative of the people. The normative ground of Montesquieu's divergences from Machiavelli is sometimes offered as a concern to protect the security of individuals as private persons (modern liberalism), which Machiavelli does not necessarily share. On the other hand, Montesquieu does share Machiavelli's concern with republican or *political* liberty. But for Montesquieu, it is not only calumnies spread in loggias and piazzas but also accusations before tribunals that risk jeopardizing republican political liberty. While Machiavelli would have calumnies punished, he does not provide a deterrent to false accusations that are openly made before tribunals.

A. *Montesquieu's French Legacy*

Constant, Guizot, and Tocqueville are all eminent political thinkers who had turbulent political careers during the first decades of the

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95 *Id.*

96 *Id.*

nineteenth century in France.[97] As liberals, they opposed the reactionary currents of the Restoration, while also abhorring revolutionary political violence (Guizot's father was guillotined during the Terror).[98] Each sought, in his own way, to move French politics under the Restoration in the direction of a constitutional monarchy with separation of powers and strong representative institutions (the model of England praised by Montesquieu).[99] These were years marked by conspiracies, assassinations, and revolts. Political trials were very much the order of the day.[100]

1. Constant

In his 1815 work *The Responsibility of Ministers*, Constant sought to blunt and limit the role of the assembly in judgment on ministerial conduct through a distinction between situations where a minister abuses the powers that they have, betraying the state in the exercise of their duties, and those where the accusation is that the minister has acted outside the law altogether: "illegal acts, that is, the usurpation of a power that the law has not conferred."[101] In the latter case, ministers should be tried as criminals before the ordinary courts "like all other citizens."[102]

In the case of Constant, his reflections on political trials stemmed from an interest in making ministers, who were under the king, accountable to the legislative branch.[103] One way of doing this, according to Constant, was for the assembly to try ministers who abused their

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97 *See* Aurelian Craiutu, *The Battle for Legitimacy: Guizot and Constant on Sovereignty*, 28 HIST. REFLECTIONS/RÉFLEXIONS HISTORIQUES 471, 471 (2002) ("Benjamin Constant (1767–1830) and François Guizot (1787–1874) are the towering figures of nineteenth-century French liberalism.").

98 *See id.* at 475, 488, 490; AURELIAN CRAIUTU, *Introduction* to FRANÇOIS GUIZOT, THE HISTORY OF THE ORIGINS OF REPRESENTATIVE GOVERNMENT IN EUROPE (Andrew R. Scoble trans., Liberty Fund 2002) (1851).

99 *See* Craiutu, *supra* note 97; *see also supra* note 91 and accompanying text.

100 *See generally* Craiutu, *supra* note 97.

101 BENJAMIN CONSTANT, DE LA RESPONSABILITÉ DES MINISTRES 2 (1815) (translated by the author).

102 *Id.*

103 *Id.* at 1–6.

powers or acted recklessly or incompetently.[104] While a strong supporter of responsible government, Constant was also clearly, as a liberal, deeply marked by Montesquieu's doubts about political trials where the legislative branch plays the role of judge and jury and also by Montesquieu's warnings about vague or inchoate political offenses.

To illustrate this distinction, Constant draws on an eighteenth-century English example, that of John Wilkes. Constant observes that the minister who ordered Wilkes's detention could be tried criminally because he had no legal authority to jail Wilkes.[105] Constant contrasts this with a situation where habeas corpus has been suspended through legal procedures.[106] The minister in that latter circumstance would have the legal authority to imprison Wilkes in the Tower, and thus would have committed no ordinary crime, but might still have had to be accountable to the legislature for using that authority in an unjustified or abusive manner.[107]

Constant then questions whether the notion here of abuse of authority is too vague or indeterminate to justify accountability through a political trial in the assembly:

> An unjust war, or a war badly waged, a peace treaty involving sacrifices not absolutely justified by the necessity of the moment, mismanagement of finances, the introduction of defective or dangerous forms of administration of justice, in the end, any exercise of power which, while fully authorized by law, would be harmful to the nation or vexatious for the citizens, without being required by the public interests . . . .One sees by this non-exhaustive definition, how it would always be illusory to attempt to set down in the case of responsibility a rule that is precise and detailed, as criminal laws ought to be.[108]

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104 *Id.*
105 *Id.* at 4–6.
106 *Id.* at 5.
107 *Id.* at 5–6.
108 *Id.* at 34–35.

Given the open-ended nature of the offense of dereliction of responsibility, Constant suggests that the ideal adjudicator would be a jury, with its "common sense."[109] But while a jury might in principle have sound intuitions about the dividing line between responsible and irresponsible or abusive conduct in everyday settings, in practice they would not be up to dealing with matters that "concern the great political problems, the most wide-reaching and at the same time more secret interests of the nation."[110] The solution that Constant proposes is that ministers be held responsible and tried before the *Chambre des Pairs*, the upper house in the French legislature.[111] Constant asserts that the *Chambre des Pairs* is characterized by independence and neutrality.[112] "Peers" held their seats on the basis of hereditary title or appointment by the king for life; because they were too numerous for the majority to expect to participate in the government as ministers, Constant thought their interest would be distinct from that of the government.[113] Thus, Constant saw them, or felt comfortable portraying them, as beyond the fray of partisan politics and immune to the political passions of the moment.[114] Moreover, "they acquire through their social position gravitas in character that dictates mature ways of inquiry and a gentleness in mores that disposes them to consideration and deference, bringing the delicate scruples of equity to legalism."[115] However idealized this portrait of the Peers may be, what is significant is Constant's search for the kind of trials that avoid ferocious vendettas against ministers, or scapegoating where a minister exercised good faith political judgment, but where, nevertheless, the enterprise failed, or the judgment proved erroneous.

Echoing Machiavelli's concern about calumnies, or accusations in the shadows, as it were, Constant is emphatic on the need for

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109 *Id.* at 22–23.
110 *Id.* at 45.
111 *Id.* at 47.
112 *Id.*
113 *Id.*
114 *Id.* at 47–48.
115 *Id.* at 48.

transparency and publicity where a minister is accused of dereliction of responsibility: "A secret process allows the accusation to continue to taint the minister in question in as much as it has merely been pushed away through an opaque inquiry, with the appearance of connivance, weakness or complicity."[116] Also echoing Montesquieu's discussion of the political dangers of harsh or vengeful punishment, Constant advocates for the use of pardons once ministers are convicted, thereby forestalling any punishment.[117] He suggests that conviction by itself, even when followed by a pardon, is a meaningful form of accountability in identifying and confirming in a public process the misconduct of a minister.[118] Moreover, the stigma attached to conviction should preclude any further electoral success of the individual in question.[119]

2. Guizot

Guizot published his work *Des Conspirations et de la Justice Politique* ("On Conspiracies and Political Justice") in 1821.[120] This was a time where conspiracy theories were abundant in French politics.[121] In the 1800s, an apparent conspiracy to overthrow the government and the monarchy led to trials of prominent liberal political figures.[122] Guizot, himself a liberal, published *Des Conspirations et de la Justice Politique* in part as a response to these prosecutions, which he argued were tainted by partisanship and openly political judgments on the accused individuals.[123]

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116 *Id.* at 53.

117 *Id.* at 65–69.

118 *Id.*

119 *Id.* at 69.

120 FRANÇOIS GUIZOT, DES CONSPIRATIONS ET DE LA JUSTICE POLITIQUE (1821) (translated by the author).

121 *See id.* at i–vi.

122 *See id.*

123 *See id.* at i, 30–33.

Guizot underlines the evidentiary difficulties of establishing guilt for conspiracy, where it has remained at the planning stage, or perhaps a matter of mere revolutionary aspiration.[124]

Guizot is concerned by the opportunity the offense of conspiracy offers to construct or fabricate a crime out of multiple "general facts" without any single overt, objectively criminal act.[125] This can lead to scapegoating and the persecution of political opponents. Such concerns align with Montesquieu's insistence that only "speeches connected to action" should be punishable.[126]

Guizot does not mince words in discussing recent events: "The talk was of a faction determined to overthrow the monarchy, of a standing conspiracy that one must disable at any price. But there was nothing to it but politics."[127] Accusations that were made in the political arena relied on vague aspersions and suspicions as well as the claim that there was a faction animated by the general spirit of rebellion. These condemnations in the assembly, animated by partisan brawling and based on so-called "general facts" about rebellion being in the air, Guizot asserts, were completely at odds with the rule of law.[128]

Thus, most were released without trial, as Guizot notes, and the cases that went to trial were those where the charges specifically alleged an act of rebellion or provocation to rebellion, as opposed to some vague conspiracy.[129]

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124 *Id.* at 37 ("In the case of conspiracy . . . as with a great number of political offenses (*délits*), and when the crime, far from being consummated, has not even really begun to be executed, it is a matter not only of knowing who are guilty but also, and even to begin with, if there is a crime. A crime, whether conspiracy or otherwise, which has to no extent been realized in a complete determinate act, has to reside in a variety of circumstances more or less in themselves non-culpable, visits, meetings, speeches, cryptic letters, etc. . . . .").

125 *Id.* at 14.

126 MONTESQUIEU, *supra* note 64, bk. XII, ch. XII, at 135.

127 GUIZOT, *supra* note 120, at 42.

128 *Id.* at 42–43 ("[M]any individuals were arrested. Despite the political allegations, one could not prosecute them on the vague basis of their being militants or conspirators. One had to find in the criminal code an offense that corresponded to the situation and in their behavior the commissions of acts defined as criminal in the code.").

129 *See id.* at 44–45.

The resulting acquittals, Guizot suggests, showed that juries are capable of seeing through the political nature of the accusations in question; these were shown for what they were, when it was necessary to actually prove in a legal process a specific offense, with an actus reus defined in the criminal law.[130] Guizot suggests the overall lesson of this episode is that accusations of political offenses, such as conspiracy and rebellion, do not belong in political assemblies but in ordinary criminal courts with jury trials:

> Within the courts . . . nothing may enter except the law and the facts envisioned by the law. This is the place where nothing can get past the rule of law. The door is closed to all passions, all influences other than those just described. Elsewhere, their presence is inevitable; here it would be criminal. All the formalities, all the strictures of the law, are prone to exclude such influences. Judges who are not for turning, the intermediation of juries, statutory precision, the imperative rules of procedure, all of this attests to the wish to place the proceedings here above all influences, and to elevate them, to the extent humanly possible, to that calm and pure domain untroubled by earthly tempests, where not a single cloud obscures the clarity.[131]

The qualification "to the extent humanly possible" indicates the aspirational nature of this idealized view of courts. The preservation of political liberty, in Guizot's perspective, depends on how well courts measure up to this ideal of the rule of law especially in fraught and polarized political circumstances. Such were the times in which Guizot was writing, and he was obviously impressed by how the French courts rose to the occasion, as it were.

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130 *Id.* at 45–46. ("Politics, which was pervasive during the legislative debates, did not enter at all into the verdicts of the juries; which judged the accused based on their own actions, and not on the general facts with which the prosecution sought to taint them.").

131 *Id.* at 71–72.

3. Tocqueville

Like Constant and Guizot, Tocqueville shared Montesquieu's reservations about placing political trials in a popular assembly or body such as a legislature; at the same time, Tocqueville admired the role of law in American political culture and so had to confront the practice of impeachment under the U.S. Constitution, which gave to the House of Representatives and the Senate respectively the role of prosecutor and judge of offenses by high officials, including the President. Here, Tocqueville places great emphasis on the fact that conviction upon impeachment does not have the consequence of a normal criminal conviction—the sole implication of a guilty verdict is removal from office. "By preventing political tribunals from inflicting judicial punishments[,] the Americans seem to have eluded the worst consequences of legislative tyranny, rather than tyranny itself . . . ."[132] Moreover, while in Europe political tribunals could judge anyone, the jurisdiction of such tribunals in the United States was limited to sitting officials, of course a further implication of the sole remedy at issue being removal from office. Political tribunals had no role in trying dissenters, resisters, etc.

Finally, Tocqueville notes with concern the vagueness with which the offenses subject to impeachment and removal on conviction are defined both in the federal Constitution and also under state law.[133] He mentions a Massachusetts law that includes as an offense "maladministration"[134]—we are here reminded of Constant's treatment of the question of ministerial responsibility and the proper means of accountability.[135] In the end, Tocqueville again reminds his European readers that, while these offenses might seem frighteningly indeterminate from the perspective of individual and political liberty, they must always keep in mind that while the consequence of conviction before a political

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132 TOCQUEVILLE, *supra* note 22, at 107.

133 *Id.* at 106–07.

134 *Id.* at 106.

135 *See infra* Section II.A.1.

tribunal in Europe might well be execution, the Americans had come up with a much more direct and at the same time gentle remedy (removal from office) where a high official abuses or misuses egregiously their public mandate.[136]

There is, however, one note of caution or a qualification in Tocqueville's praise for the way in which political judgment occurs in the United States: removal from office through impeachment seems more of a remedy for ordinary maladministration as opposed to "an extraordinary resource, which is only to be employed in order to rescue society from unwonted dangers."[137] While the remedy may be less questionable (from the perspective of liberty) it may also be less effective in extreme situations where the political order is threatened. The European remedy of criminal punishment, in some cases severe, is problematic for its abuses, particularly of a partisan nature, but Tocqueville implies that in moments of "unwonted dangers" it may be necessary and appropriate.[138] However, in turning to Hamilton in *The Federalist*, he never considered impeachment as an exclusive remedy but as very likely a prelude to criminal prosecution and punishment in the courts.[139]

B. *Montesquieu's American Legacy: The Federalist*

As in other matters, Montesquieu's influence on the approach to political trials in *The Federalist* is evident. Madison and Hamilton defend the Constitution's proposed strict limits on trials for treason, echoing Montesquieu's articulation of the dangers of a too broad or vague understanding of the offense—above all, the danger to liberty posed by extending it to condemnation of speeches, writings, or even beliefs. As Madison puts it in *Federalist No. 43*:

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136 TOCQUEVILLE, *supra* note 22, at 106–07.

137 *Id.* at 105.

138 *Id.*

139 *See* THE FEDERALIST NO. 69, *supra* note 21.

> [N]ew-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.[140]

In *Federalist No. 84*, answering those concerned that an explicit enumerated bill of rights was needed to protect liberty in the new federal republic, Hamilton cited the constitutional limitation on treason trials, along with, inter alia, the requirement of jury trials for serious criminal offenses, as among the ways that protections for liberty were already embedded in the constitutional project.[141] In particular, he mentions Article 3, Section 3: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."[142]

The requirement of two witnesses was one explicitly advocated by Montesquieu, it will be recalled.[143] The need to prove an "overt act" is in accord with Montesquieu's notion that speeches "do not become crimes except when they prepare, accompany, or follow a criminal act."[144]

On the other hand, "tempestuous waves of sedition and party rage," as Hamilton put it in *Federalist No. 9*, are endemic to political life in a republic, even one as carefully designed in its institutions as the U.S. Federation.[145] As he elaborates in *Federalist No. 28*:

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140 THE FEDERALIST NO. 43 (James Madison).

141 THE FEDERALIST NO. 84 (Alexander Hamilton).

142 *Id.* (quoting U.S. CONST. art 3, § 3, cl. 1).

143 *See supra* note 82 and accompanying text.

144 MONTESQUIEU, *supra* note 64, bk. XII, ch. XII, at 135.

145 THE FEDERALIST NO. 9 (Alexander Hamilton).

> [S]editions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body; [] the idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government), has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction. Should such emergencies at any time happen under the national government, there could be no remedy but force.[146]

The fear of punishment was needed as a deterrent: "The hope of impunity is a strong incitement to sedition; the dread of punishment, a proportionably strong discouragement to it."[147]

Proportionality in the measures to suppress sedition and insurrection is of key importance; *The Federalist* clearly rejects impunity while also counseling against undue harshness, where punishment might appear as persecution. This echoes Montesquieu's demand for "moderation" in political justice.[148] This is where the presidential power of pardon comes into play, especially when it is used in a timely fashion:

> [T]he principal argument for reposing the power of pardoning in this case to the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments, when a welltimed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.[149]

Hamilton was fully aware of the danger in allowing the President to pardon even the offense of treason; there might be cases where "the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded."[150] But, as he explains in *Federalist No. 69*, "The

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146 THE FEDERALIST NO. 28 (Alexander Hamilton).

147 THE FEDERALIST NO. 27 (Alexander Hamilton).

148 *See* MONTESQUIEU, *supra* note 64, bk VI, ch. XII, at 60.

149 THE FEDERALIST NO. 74 (Alexander Hamilton).

150 *Id.*

President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."[151] Moreover, "The power of the President, in respect to pardons, would extend to all cases, EXCEPT THOSE OF IMPEACHMENT."[152] In other words, a President complicit in treason would be impeached, could not pardon himself in order to avoid removal from office, and, once removed from office, obviously would not only no longer be capable of exercising the pardon power, but would be subject to criminal prosecution in the courts. In such a situation, the President would have little leverage to extract pardons for others involved in insurrection from their successor in the Oval Office.

This brings us to the institution of impeachment and its relation to political justice more generally. Surely well aware of Montesquieu's strong objection to holding political trials in legislative bodies, Madison and Hamilton took particular pains to emphasize safeguards against the process being unduly influenced by partisan political passions and interests. The requirement of a supermajority vote to convict in the Senate, Hamilton notes, "guards against the danger of persecution, from the prevalency of a factious spirit . . . ."[153] So too does assigning the separate roles of impeachment and trial to the House of Representatives and the Senate, respectively.[154] Hamilton is concerned to show the "security to innocence" against partisan persecution in the Senate.[155] He does not reflect, on the other hand, that the two-thirds voting rule might allow a partisan faction to block *conviction* of a *guilty* President.

In the early years of the federal Constitution, the moderation and balance in the arrangements set out and defended in *The Federalist* would

151 THE FEDERALIST NO. 69, *supra* note 21.

152 *Id.*

153 THE FEDERALIST NO. 66 (Alexander Hamilton).

154 *Id.*

155 *Id.*

be placed under stress. In 1798, the majority Federalist party passed the Alien and Sedition Acts.[156] Among other things, the Alien and Sedition Acts created a criminal offense of seditious libel, which outlawed criticism of the government made by journalists—especially those who were Republicans, the political enemies of the Federalists.[157] One might have thought that by strictly limiting in the Constitution the scope of the offense of treason, the intent was precisely to constrain criminal punishment based on broad theories of disloyalty or disrespect to the government (Montesquieu's *lèse-majesté*). Breaking with his own political party, Madison spoke out strongly against the danger to liberty posed by the offense of seditious libel (even though the law allowed for a defense of truth). In the Virginia Report of 1800, Madison argued that the Constitution contained no enumerated power that allowed Congress to criminalize political speech; indeed, he suggested that the effect of the First Amendment to the Constitution was "a denial to Congress of all power over the press . . . ."[158]

III. POLITICAL CORRUPTION TRIALS: EDMUND BURKE AND THE IMPEACHMENT AND TRIAL OF WARREN HASTINGS

Political trials for corruption—including receipt of bribes or illegal gifts, campaign finance offenses, and influence peddling—have become commonplace in democracies; recent examples include Brazilian President Lula da Silva, Israeli Prime Minister Benjamin Netanyahu, and United States Senator Robert Menendez.[159] As Kevin Davis observes, in

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156 Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802); Alien Friends Act of 1798, ch. 58, 1 Stat. 570 (expired 1800); Alien Enemies Act of 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24); Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1800); *see Alien and Sedition Acts (1798)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/alien-and-sedition-acts [https://perma.cc/LN3W-CRHK].

157 Sedition Act § 3.

158 JAMES MADISON, REPORT OF 1800 (1800).

159 *See* Ginsburg, *supra* note 18; Conci, *supra* note 18; *The Aftermath of the Senator Menendez Trial and Implications for Bribery Cases*, COLUM. L. SCH.: CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY (2018), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1029&context=public_integrity [https://perma.cc/8TRT-HDVF].

corruption cases, "political actors may attempt to induce law enforcement agencies to target other political actors in order to alter the balance of power in their favor."[160] It is widely suspected that the pursuit of Lula for corruption involved such politicization.[161]

The classic statement of the importance of criminal accountability for corruption to the health of a constitutional democracy is to be found in Edmund Burke's speeches in the trial of Warren Hastings for abuses perpetrated in his role as governor of Bengal and subsequently governor-general of India.[162] Burke is widely regarded as a conservative thinker because of his rejection of revolutionary politics, as exemplified in the French Revolution, and his view that liberty is to be found in constitutional tradition rather than abstract rights.[163] At the same time, he strongly supported the rule of law, the holding of political figures accountable under law, and representative democracy as embodied in British parliamentary institutions.[164] He is therefore classified by some as a "Whig" or liberal.[165]

In the words of one historian, "The trial of Warren Hastings was by many accounts not just the trial of the century, but the most

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160 Kevin E. Davis, *Politicization of International Anticorruption Law*, *in* PUBLIC SECTOR PERFORMANCE, CORRUPTION AND STATE CAPTURE IN A GLOBALIZED WORLD 147, 148 (Susan Rose-Ackerman ed., 2024).

161 *See, e.g.*, CAROL PRONER, GISELE CITTADINO, GISELE RICOBOM & JOÃO RICARDO DORNELLES, COMMENTS ON A NOTORIOUS VERDICT: THE TRIAL OF LULA 182 (2018).

162 Davis summarizes the multiple charges against Hastings as follows:

> Hastings ousted the rightful ruler of a province (known as a "nawab") without cause and replaced him with a usurper; he took bribes in exchange for favorable decisions in disputes concerning inheritances and the award of rights to collect taxes, he circumvented the books and records of the East India Company, he and his designates confiscated property and redistributed it arbitrarily; and his tax collectors tortured people hideously, to the point where they were compelled to sell their bodies.

KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 21–22 (2019) (footnotes omitted).

163 *See, e.g.*, NICHOLAS B. DIRKS, THE SCANDAL OF EMPIRE: INDIA AND THE CREATION OF IMPERIAL BRITAIN 83–84 (2006).

164 *See* Peter Berkowitz, *Burke Between Liberty and Tradition*, HOOVER INST. (Dec. 1, 2012), https://www.hoover.org/research/burke-between-liberty-and-tradition [https://perma.cc/FJ4P-3NQW].

165 *Id.*

extraordinary political spectacle in Britain during the second half of the eighteenth century."[166] The trial involved the revival of the practice of impeachment that had fallen into disuse in the British constitutional system.[167] The House of Commons voted for impeachment, set out the charges, and Burke was named the lead prosecutor ("manager") of the trial in the House of Lords.[168] For Burke, indeed, the trial of Hastings was also a trial, or test, of this ancient practice and whether it could deliver justice and accountability.[169]

As Burke admitted, much of the wrongdoing against Hastings could have led to prosecution in the ordinary courts as the "well-known crime, called misconduct in office."[170] While the liberal in Burke insisted that Hastings be subject to the rule of law, as any suspected criminal, whether of high or low station, would be, the conservative in him sought to put Hastings's morals on trial, and his alleged corruption of the morals of others at least through example.[171] The trial should not only uphold the law but vindicate political virtue. Thus, according to Burke, "It is by this tribunal that statesmen who abuse their power, are accused by statesmen, and tried by statesmen, not upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality."[172]

Hastings should be convicted for failing to use his power "according to the established rules of political morality, humanity, and equity."[173] Indeed, Burke admits to having little interest in the specific charges in the indictment: Hastings could just as easily have been charged with different offenses.[174] Burke considered that it was in judging the large-scale

166 DIRKS, *supra* note 163, at 87.

167 *See id.* at 87–88.

168 *See id.* at 88.

169 *Id.* at 105–07.

170 BURKE, *supra* note 19, at 92.

171 *Id.* at 487.

172 *Id.* at 11.

173 *Id.* at 482.

174 *Id.* at 459 ("[T]he House found it expedient to select twenty specific charges, which they afterwards directed us their managers to bring to your lordships' bar. Whether that which has been brought forward on these occasions, or that which was left behind, be more highly criminal, I for

misconduct of a high official like Hastings that gave the impeachment process its rationale; if it could not cause justice to be done and seen to be done in a case like this, it might as well be abandoned.[175] Burke's claim is a dramatic form of the observation, as underlined in the Introduction of this Article, that political trials are also trials of the institutions through which they are conducted. This creates a specific set of risks and opportunities, especially at a time when institutions are being questioned. Burke sought to vindicate and revive the "great parliamentary process" of impeachment.[176] Only by convicting Hastings, however, could such vindication occur, for otherwise "the tribunal is condemned."[177]

Burke set out what could be termed a transformative view of what a political trial, in this case the trial of one individual, could accomplish. The systemic problems with Britain's governance of India, and especially the role of the East India Company, had been on the political agenda for some time at Westminster.[178] Efforts at reform had failed.[179] The previous governor-general Clive had himself been brought before the Commons to answer for allegations of abuse, including corruption.[180] As Lida Maxwell suggests, "Burke viewed impeachment as a superior approach because it offered a way of holding Hastings and the Company as a whole accountable for crimes that he increasingly believed could not be addressed by ordinary courts or ordinary practices of legislative reform."[181]

Burke's transformative view of the political trial depends on presenting the evil character and large-scale wrongdoing of the accused as the root, or at least the exemplification, of systemic injustice that

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one, as a person most concerned in this inquiry, do assure your lordships that it is impossible for me to determine.").

175 *Id.* at 10–12.

176 *Id.* at 12.

177 *Id.* at 457.

178 DAVIS, *supra* note 162, at 22–23.

179 *Id.*

180 DIRKS, *supra* note 163, at 37–86.

181 LIDA MAXWELL, PUBLIC TRIALS: BURKE, ZOLA, ARENDT, AND THE POLITICS OF LOST CAUSES 43 (2015).

requires correction. The transformative aspiration is reflected in Burke's claim that the justice being sought in Hastings's trial is not immediate or retrospective, but "provident": "Its chief operation is in its future example . . . ."[182] According to Burke, "[I]f you strike at [Hastings] with the firm and decided arm of justice, you will not have need of a great many more examples. You strike at the whole corps, if you strike at the head."[183] Burke describes Hastings as "not only a public robber himself, but the head of a system of robbery; the captain-general of the gang; the chief under whom a whole predatory band was arrayed, disciplined, and paid."[184] Indeed, Burke notes that often the prosecution of minor offenders or subordinates can be abused politically to shield "crimes of a high order, and in men of high description."[185]

Moreover, the impact of Hastings's corruption is not limited to the activities of his whole "gang"; rather, if Hastings is unchecked, his actions will undermine the morality of the British political and official classes generally, indeed perhaps of the citizenry as a whole:

> It is not to the gang of plunderers and robbers, of which I say this man is at the head, that we are only, or indeed principally, to look. Every man in Great Britain will be contaminated and must be corrupted, if you let loose among us whole legions of men, generation after generation, tainted with these abominable vices, and avowing these detestable principles.[186]

The condemnation of Hastings, Burke appears to claim, will be a turning point in arresting this calamitous decline of public and private virtue.

The difficulty facing Burke's theory is that, as Burke himself admits, the systemic faults in British colonial governance long preceded him.[187]

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182 BURKE, *supra* note 19, at 473.
183 *Id.* at 15.
184 *Id.* at 468.
185 *Id.* at 15.
186 *Id.* at 487.
187 *Id.* at 25–27.

In some measure they related to matters unconnected to the vices of individual officials or networks of them, as Burke points out, including the totally inadequate education of many colonial officials charged with significant governance and accountability tasks.[188] Indeed, Burke points to intrinsic pathologies in the political economy of British colonialism, a system that "began in commerce, and ended in empire."[189] At one point, in response to Hastings's defense, Burke allows that Hastings was operating in a "vicious" or "evil" system not of his own creation.[190] Yet Burke claims that a virtuous official in Hastings's position, instead of embracing or profiting off of the evil system, would have used his powers to the fullest in order to mitigate or correct the evil.[191]

This raises serious questions about the sustainability of Burke's thesis of the transformative potential of the trial. Burke was all too aware of the difficulties of reform through the political process. His faulting of Hastings for not using his power to correct the system suggests that the standards of political morality against which Hastings was to be judged are not so clear or obvious as Burke suggests.[192] Perhaps Burke was setting them unrealistically high. Singling out Hastings as the mastermind of corruption in British rule in India is one thing; singling him out because he took the system as he found it, and exploited rather than attempted to fight it, is another.

There seems to have been sufficient evidence that Hastings was guilty of many ordinary offenses such as taking bribes, which could have been prosecuted in the ordinary courts.[193] Hastings's acquittal, which was a devastating blow to Burke's campaign against British corruption in India and to his devotion to the institution of impeachment, may well be connected to Burke's determination that the trial be transformational and operated against the standards of political morality rather than positive

188 *Id.* at 24–25.
189 *Id.* at 23.
190 *Id.* at 129.
191 *Id.*
192 *Id.*
193 *Id.* at 147.

law.[194] Setting the focus on political morality allowed Hastings to mount defenses that, as Burke noted, would not avail a common criminal, such as that he merely used the system as he found it.[195] Given that Burke insisted that Hastings be judged as a statesman, Hastings could not be faulted for arguing that he was effective in achieving the government's goals, and noting that his administration was actually praised by the East India Company itself.[196]

Burke proposed that Hastings be tried and condemned as the very incarnation of the evil of colonial abuses in India.[197] Hastings defended himself by articulating an alternative political morality, which Goodman characterizes as "the discourse of political realism."[198] Hastings claimed that he was charged with the task of imposing British administration and serving British commercial interests in a territory characterized by contested local sovereignty and legal chaos.[199] He did the job he had been sent to do, in real-world conditions. Thus, he asserted he was empowered to govern with a strong hand.[200] He was not expected to observe the niceties of the rule of law and constitutionalism as practiced in Britain himself. Hastings was challenging the Lords to own up to what the colonial project implied and not use him as a scapegoat for it.[201]

A significant Whig political thinker and historian of the next century, Thomas Babington Macaulay put Burke's difficulty in the following way:

> It was . . . felt [by many] that, though, in the ordinary course of criminal law, a defendant is not allowed to set off his good actions against his [political] crimes, a great political cause

194 *Id.* at 482.

195 *Id.*

196 *See generally* DAVIS, *supra* note 162.

197 *Id.*

198 Rob Goodman, *"The Low Principles of Jurisprudence": Legal Indeterminacy in Edmund Burke's Impeachment of Warren Hastings*, 82 REV. POL. 459, 477 (2020).

199 *Id.* at 473.

200 *Id.*

201 *Id.*

> should be tried on different principles, and that a man who had governed an empire during thirteen years might have done some very reprehensible things, and yet might be on the whole deserving of rewards and honors rather than of fine and imprisonment.[202]

The Hastings episode involved an eminent political thinker putting to the test his own theory of the transformative political trial as well as his commitment to the institution of impeachment—the legislative setting for indictment and trial. Both the tensions in Burke's own presentation of the nature of Hastings's failings in political morality and the outcome of an acquittal, despite massive evidence of specific crimes, suggest the limits and weaknesses of the transformative theory of the political trial.

While Burke presented impeachment as the judgment by "statesmen" according to high standards of political morality, in real life, Macaulay suggested, the Lords were almost certain to be judging on the basis of partisanship and political expediency:

> In truth, it is impossible to deny that impeachment, though it is a fine ceremony, and though it may have been useful in the seventeenth century, is not a proceeding from which much good can now be expected. Whatever confidence may be placed in the decision of the Peers on an appeal arising out of ordinary litigation, it is certain that no man has the least confidence in their impartiality, when a great public functionary, charged with a great state crime, is brought to their bar. They are all politicians. There is hardly one among them whose vote on an impeachment may not be confidently predicted before a witness has been examined . . . .[203]

As Macaulay also observed, Hastings was, in effect, tried not only in the Lords, but also in the press and the coffee shops of London. According to Macaulay, "At the commencement of the trial there had been a strong

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202 THOMAS BABINGTON MACAULAY, MACAULAY'S ESSAY ON WARREN HASTINGS 145 (Joseph Villiers Denney ed., 1907).

203 *Id.* at 141.

and indeed unreasonable feeling against Hastings. At the close of the trial there was a feeling equally strong and equally unreasonable in his favor."[204] According to Macaulay, Hastings's defense team attempted to sway public opinion by bribing journalists, paying for pamphlets arguing in his favor by supposedly independent writers, and other similar tactics.[205] Burke lost, then, also in the court of public opinion.[206] There is an irony here, for, as Maxwell explains, Burke thought, at least initially, that a high-profile political trial would create public attention and support, making it difficult for the elites to protect Hastings.[207] As Maxwell emphasizes, Burke, in some of his other philosophical writings, presents the "people" as the ultimate guardian of political virtue (though elsewhere bemoaning their fickleness and susceptibility to manipulation).[208] It proved possible that the people could at one time predominantly see Hastings as a rogue, and at another as a sympathetic, even admirable character. Macaulay tells us that after his acquittal, Hastings retired to private life; when he reemerged 27 years later, he was showered with praise and honors, with Oxford University even conferring on him an honorary doctorate.[209]

IV. IN THE SHADOW OF TWENTIETH-CENTURY AUTHORITARIANISM

In contrast with the rich tradition of political philosophers reflecting on political trials within constitutional regimes, as articulated above, in more recent times, political thinkers have been much more preoccupied with transitional or international political trials, in the wake of the end of the Second World War (i.e., Nuremberg, the trial of Adolph

204 *Id.* at 144–45.

205 *Id.* at 146–47.

206 *Id.* at 142.

207 MAXWELL, *supra* note 181, at 53.

208 *Id.* at 52–65.

209 MACAULAY, *supra* note 202, at 151–52 (noting that Hastings was welcomed in the Commons with acclamations by many of the same members who had once managed his impeachment.).

Eichmann),[210] the end of communism,[211] and other regime changes—for instance in Latin America.[212] But there are important exceptions. Foremost among them is arguably Otto Kirchheimer, a Jewish refugee from Nazi Germany, whose 1961 work attempts a comprehensive study of political trials, including both domestic trials in constitutional regimes as well as show trials in the Soviet bloc, as well as international and transitional trials.[213] While her important work *Legalism* focuses largely on the issues posed by the Nuremberg trials of Nazi war criminals and other exercises in international and transitional justice,[214] Judith Shklar ends the work with a blistering critique of domestic political trials of left-wing activists in the United States.[215] A common ground between Kirchheimer, a sometime member of the Frankfurt School of leftist political thinkers, and Judith Shklar, a liberal and, like Kirchheimer, also a Jewish refugee from Nazism,[216] is a rejection of "legalism"—the notion that legal processes and institutions can, or should, be insulated from political ends.[217]

The starting premise of Kirchheimer in *Political Justice* is that the legal system, and particularly that of criminal justice, is inevitably a means by which political competition between adversaries is pursued in

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210 *See generally* SHKLAR, *supra* note 12.

211 *See generally* CLAUS OFFE, VARIETIES OF TRANSITION: THE EAST EUROPEAN AND EAST GERMAN EXPERIENCE (1996) (discussing political trials at the end of communist regimes).

212 *See generally* CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996) (discussing political trials after a regime change in Latin America).

213 *See generally* HUBERTUS BUCHSTEIN, ENDURING ENMITY: THE STORY OF OTTO KIRCHHEIMER AND CARL SCHMITT 276–79 (2024). For another exception, see Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 97–98 (2005) (discussing Shklar's beliefs on political trials).

214 *See generally* SHKLAR, *supra* note 12.

215 *See id.* at 209–20.

216 *See* BUCHSTEIN, *supra* note 213, at 276–79; Judith N. Shklar, *A Life of Learning* 7–8, 13, 16 (Am. Council of Learned Soc'ys Occasional Paper No. 9, 1989).

217 SHKLAR, *supra* note 12, at 111–12. In an endnote, Shklar states the considerable influence of Kirchheimer on her thinking in this part of the book: "If I do not cite [Kirchheimer's *Political Justice*] page by page it is only to avoid an excess of notes, and because my debt to it is too general." *Id.* at 237 n.45.

democratic mass societies.[218] Here, the goal is not necessarily the complete and permanent removal of the adversary from the political scene, for example by conviction for a grave offense such as treason. It could simply be to turn public opinion against them. As already presaged by Burke's staging of the Hastings impeachment as a public spectacle, the final verdict sought is that of the people, not of the actual judges and jury.[219] Kirchheimer observes:

> Modern means of communication do not restrict participation in or reactions to a trial by those present and, with some delay, by a wider educated public. If the participants wish, proceedings may be thrown open to virtually the whole world. The dynamics of . . . a virtually unlimited public in the unfolding of political reality, re-created and severely compressed for trial purposes into categories within easy reach of the public's understanding—fashions a new political weapon.[220]

But, for public opinion to be swayed effectively through a political trial, the public must have trust that the *judicial institutions* invoked for political ends are themselves not thoroughly politicized: "[T]heir particular public position of trust has made the courts' conduct of politically tinged trials a crucial element in the political process."[221] The implication is that the judiciary itself must then pay attention to public opinion in the context of a political trial—if the judiciary appears to itself be coopted by the political ends for which the trial is being pursued, or to favor either side politically, the "public position of trust" will be eroded.

This is complicated by the fact that judges often have a particular personal political background and may be seen as connected to the governing authorities, to whom they owe their career prospects.[222] In

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218 OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 6 (1965) ("What, then, is the function of courts in political strife? . . . [T]he courts eliminate a political foe . . . according to some prearranged rules.").

219 See *supra* Part III.

220 KIRCHHEIMER, *supra* note 218, at 7.

221 *Id.* at 18.

222 *Id.* at 18–19.

response, Kirchheimer argues that judges, as well as prosecutors and other actors within the system, are subject to the counterinfluence of an ethics of professionalism that pulls them away from the pressure exerted by their political masters, although this varies from one democracy to another.[223] "[T]he working assumption must remain that the prevalence of universally shared community values, the discipline of the profession, and the self-discipline required from each member of the bench will minimize whatever impediments arise from the judge's personal equation."[224] In the American case,

> Despite . . . manifest shortcomings of appointment procedures, the mere fact that appointment—which, by the federal government, is almost exclusively for life—often comes at the zenith of a successful legal career is not without its consequences. It allows, and at least on the federal level conduces to, some detachment from former associations, if not necessarily habits of thought. It encourages a concentration on making a name that conforms with the standards of a profession [that in America traditionally has high prestige].[225]

What Kirchheimer calls the "see-saw battle" between the "bureaucratic-professional" element and the "democratic-political" is, he suggests, particularly intense under conditions of political polarization.[226] Writing in the early 1960s, Kirchheimer notes the contemporary polarization of Western democratic societies, "mitigated only by the general contemporary trend toward depoliticization in mass society."[227]

Kirchheimer doubted whether the elements of professional integrity, ethics, and prestige would be sufficient to balance the "democratic political" where a society has become fundamentally fractured by class, partisan, or ideological conflict.[228] If there is no

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223 *Id.* at 13.
224 *Id.* at 217.
225 *Id.* at 183.
226 *Id.* at 13, 16–17.
227 *Id.* at 17.
228 *Id.* at 209–11.

"common ground," no minimum common consensus about values and institutions, and where the conflict between political adversaries has morphed into "a sort of legal Armageddon," any decision the judge takes may "appear partisan in the eyes of many in the community."[229] In the democratic arena, each move of the judge will be assessed on the basis of whether it gives a political advantage to one side or the other.

In his discussion of the institution of the jury, Kirchheimer interrogates the notion that the jury's legitimacy depends on it being representative of a broad cross-section of the population.[230] Again in the shadow of political polarization, Kirchheimer asks: "Would a more representative cross-section be . . . a more politically balanced cross-section?"[231] One senses that Kirchheimer is skeptical concerning the possibility of creating a politically balanced jury in a polarized society.[232] How would one imagine the deliberation in a *political* trial of a jury divided between members on opposite ends of a highly polarized political spectrum? Kirchheimer suggests that "Much will depend on whether the panel happens to include individuals who have had enough opportunities to compare the judgment and presuppositions impressed on them by their environment, including the mass media, with some radically different life situations, expectations, and evaluations."[233]

While it tests the legitimacy and durability of legal institutions, Kirchheimer suggests that, in the end, political justice rarely affords a true victory for the group pursuing it against their adversary.[234] Rather, "Political claims eventually stand or fall on their own strength."[235] Thus, "[P]olitical justice is bound to remain an eternal detour, necessary and grotesque, beneficial and monstrous, . . . without the intercession of the

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229 *Id.* at 15, 210.
230 *Id.* at 222–24.
231 *Id.* at 222.
232 *Id.* at 224.
233 *Id.*
234 *Id.* at 430.
235 *Id.*

judicial apparatus the fight for political power would continue as relentlessly, but it would be less orderly."[236]

A. *Kirchheimer, Shklar, and Loewenstein on Prosecuting Allegedly Extremist Doctrines and Groups*

In *Legalism*, as noted, Judith Shklar broadly applies Kirchheimer's approach to law and politics in the context of international and transitional trials, but she ends the book with a critique of domestic U.S. political trials, notably the prosecution of U.S. Communist Party members for alleged advocacy of the violent overthrow of the American system of government.[237] While influenced by Kirchheimer's approach of balancing the risks and benefits of political trials, Shklar adopts a somewhat more negative principle: a presumption against them in constitutional systems.[238] While they may be necessary on occasion, "the fewer political trials, the better."[239]

Shklar notes that the highly restrictive definition of treason adopted in the Constitution,[240] "inspired by the Founding Fathers' distaste for political trials,"[241] as well as the protections of the Bill of Rights, have kept political trials in the United States to a minimum. This did not, however, prevent the adoption or mimicry of legal forms in the "extrajudicial persecutory politics" of the McCarthy-era House Committee on Un-American Activities.[242]

At the same time, in the 1950s trials of Communist Party members, Shklar sees an unacceptable departure from liberal principles. She focuses on *United States v. Dennis*,[243] perhaps because the decisions in it involved

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236 *Id.*

237 SHKLAR, *supra* note 12, at 210–20.

238 *Id.* at 220.

239 *Id.* at 210.

240 *See supra* Section II.B for the discussion of *The Federalist* on political trials.

241 SHKLAR, *supra* note 12, at 211.

242 *Id.* at 212–20.

243 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

some of the leading judicial minds in the country and thinkers in their own right—Learned Hand at the appellate level, and on the Supreme Court, among others, Justices Felix Frankfurter and Robert Jackson (the latter being the Chief United States Prosecutor at Nuremberg).[244] The Communist Party members in the *Dennis* case were charged under the Smith Act, Section 3 of which made it a crime to "teach and advocate the overthrow and destruction of the Government . . . by force and violence."[245] In the *Dennis* case, there were two interrelated questions that preoccupied the judges in somewhat different ways. First, was there any error in the way in which the judge and jury played their roles in determining whether the activities of the defendants constituted "advocacy" within the meaning of the Smith Act?[246] The second question was on the constitutionality of this part of the Smith Act. Was criminalizing "advocacy" a limit on speech compatible with the First Amendment?[247]

There were arguably other cases where justice was politicized in the Cold War context of persecution of domestic Communists or alleged Communist sympathizers. Shklar herself mentions the trials of Alger Hiss and the Rosenbergs.[248] In those instances, whether or not one thought the convictions were justified on the facts, there were alleged "past criminal acts" being tried (such as espionage).[249] By contrast, in *Dennis*, Learned Hand—in a move that gained support from some of the Supreme Court justices—formulated the notion that speech could be properly criminalized even if the action it advocated was in the indefinite future, with no concrete actors or plan of action in the here and now being

244 SHKLAR, *supra* note 12, at 214–20.

245 *Dennis*, 341 U.S. at 497 (citing Smith Act, Pub. L. No. 76-670, 54 Stat. 670 (1940)).

246 *Id.* at 497–98. The defense had argued that they were merely teaching an abstract political doctrine with a theoretical commitment to violent struggle rather than addressing "advocacy" to any actual individuals or groups that they expected to take action to overthrow the government. *Id.* at 582–83, 585–86.

247 *See* SHKLAR, *supra* note 12, at 211–12.

248 *Id.*

249 *Id.* at 212.

proposed.[250] What the Court had to ask was "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[251] During the Cold War, when the Soviet version of communism was widely viewed as the greatest threat to freedom, it was certainly easy to see how, even if improbable, the overthrow of the government by Communists would be a very grave "evil."[252]

Against this, Shklar asserts the classical liberal principle that allegedly seditious speech should only be criminalized when connected to a past overt act in furtherance of insurrection or other crimes of state here and now: "[S]peeches do not become crimes except when they prepare, accompany, or follow a criminal act."[253]

As Shklar puts it in her critique of Learned Hand, "[T]he criminality of the communists depended on the obnoxiousness of their doctrines and their future danger, not their past acts. Now it hard to see whom the First Amendment protects if not the obnoxious."[254]

Thus, Eric Posner is misleading here when he claims Shklar "does not persuasively explain why [criminalizing 'mere threats'] in this way violates liberal principles."[255] As Shklar explains, the "clear and present danger" test did articulate the liberal principle, espoused by Montesquieu and his successors, of no criminalization of speech alone, and what happened in *Dennis* was that in response to specific hatred of communism as the ideology of America's foreign enemy, the Soviet Union, the "clear and present danger" test was abandoned or diluted, such that de facto speech could be criminalized without the need to prove a connection to any tangible concrete actions.[256]

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250 *Dennis*, 341 U.S. at 510.

251 *Id.* (quoting *Dennis*, 183 F.2d at 212).

252 SHKLAR, *supra* note 12, at 214.

253 MONTESQUIEU, *supra* note 64, bk. XII, ch. XII, at 135.

254 SHKLAR, *supra* note 12, at 214.

255 Posner, *supra* note 213, at 98.

256 SHKLAR, *supra* note 12, at 214.

It is worth noting that there is at least one democratic thinker, Karl Loewenstein, who has made a principled case for a democratic regime limiting or suspending civil liberties in order to counter the teachings and activities of extremists or anticonstitutional groups even before they take concrete steps to overthrow the regime.[257] Like Kirchheimer, Karl Loewenstein was a German-Jewish legal and political thinker formed in the Weimar Republic who spent most of his academic career as a refugee academic in the United States.[258] As Udi Greenberg observes, "Loewenstein is widely known as the coiner and chief proponent of 'militant democracy,' the theory that claimed that democratic states had the authority and duty to curb the liberties of antidemocrats."[259] For Loewenstein, "the demise of the [Weimar] republic was due less to the 'satanic power of superior leaders' than by 'lenient and generous liberal democracy' that granted protection of its impartial institutions to movements and parties openly anti-democratic."[260] According to Loewenstein, writing toward the end of the Weimar Republic, fascist extremists (here the Nazis) rely on "mobilizing emotionalism" and on "permanent psychic coercion" to gain the popular support needed to come to power and ultimately destroy liberal democracy under the rule of law.[261] Constitutional liberal democracy, by contrast, depends on rational forms of legitimation:

> Democracy is utterly incapable of meeting an emotional attack by an emotional counterattack. . . . As a rational system, democracy can prove its superiority only by its achievements, which are obfuscated by economic distress and discredited by

257 *See* Udi Greenberg, *Militant Democracy and Human Rights*, 42 NEW GERMAN CRITIQUE 169 (2015); *see also* Teitel, *supra* note 14. The leading theorist of transitional justice, Teitel, focuses on the role of the judiciary in the context of the rebuilding of democracy in Europe in the post-World War II period transition. *Id.*

258 *See generally* Greenberg, *supra* note 257.

259 *Id.* at 170.

260 Arkadiusz Górnisiewicz, *Personal Enemies, Conceptual Friends. Karl Loewenstein and Carl Schmitt on Self-Destructive Legalism*, 30 J. POL. IDEOLOGIES 435, 435, 449 (2025) (quoting KARL LOEWENSTEIN, POLITICAL RECONSTRUCTION 127 (1946)).

261 Loewenstein, *supra* note 28, at 418 (1937).

> social shortcomings. The values of liberty seem secure, with the result that to many they appear worn out by routine, faded, pale, and glamourless. Democracy could not devise emotional formulas capable of competing with the fascist Pied Pipers.[262]

Thus, argues Loewenstein, constitutional democracies need to adopt "autocratic methods."[263] Some of the liberal and democratic freedoms that characterize constitutional democracy must be sacrificed, at least temporarily, for its self-preservation. Thus, for example, Loewenstein endorses the banning of extremist, antidemocratic, or anticonstitutional political parties and even prohibiting "the ostentatious wearing of political uniforms and other symbols of political allegiance" to extremist movements.[264]

In the chapter of *Political Justice* titled *Legal Repression of Political Organizations*, Kirchheimer expresses considerable doubt as to whether this kind of sacrifice of liberal and democratic rights will in fact lead to the effective self-preservation of constitutional democracy. Assuming that it does not seek to suspend rights and freedoms altogether, legislation against "extremist" political organizations in a constitutional democracy places the judge in the difficult position of weighing the nature of the threat posed by the group against the impairment of liberal democratic rights and freedoms:

> [T]he horizon of the judge [is that of] searching for [an]. . . adequate gauge of the bearable and unbearable range and nature of revolutionary opposition. He must consider past experience, future expectations, the ends pursued and means applied by the revolutionary group, the doctrine it subscribes to, and the relation, if any, between doctrine and action patterns.[265]

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262 *Id.* at 428.

263 *Id.* at 432.

264 Karl Loewenstein, *Militant Democracy and Fundamental Rights, II,* 31 AM. POL. SCI. REV. 638, 639 (1937).

265 KIRCHHEIMER, *supra* note 218, at 137.

For Kirchheimer, the contradiction of militant democracy is this: "When foreseeably effective, repression seems unnecessary; when advisable in the face of a serious threat to democratic institutions, it tends to be of only limited usefulness, and it carries the germs of new, perhaps even more menacing dangers to democracy."[266] One could add that where a mass movement has taken hold, political trials of its leaders or operatives risk serving the extremists' cause, attracting new recruits angered by the apparent injustice of persecuting popular leaders, and offering the movement the opportunity to use the trial itself as political theater in the service of the emotionalism that Loewenstein identifies as the superior legitimizing force of such movements.[267]

Such was arguably the case in Hitler's 1924 trial for the so-called Beer Hall Putsch.[268] As Kirchheimer notes, in 1924, a severe enough militant democracy might have prevented Hitler's ultimate rise to power.[269] In the end, however, the Bavarian court treated Hitler with a leniency that signaled to the Nazi movement that militant democracy was not a real threat.[270] According to Douglas Linder, the judge permitted Hitler to use the trial as a forum for long political speeches, with the unintended result of increasing Hitler's popularity.[271] The trial is an excellent illustration of militant democracy's problem of how to calibrate the level of severity or repression: too little will not stop the movement and may indeed legitimate it further; too much may create a sense of injustice that leads to the movement gaining new recruits among those who see its leaders as unfairly oppressed.

Along similar lines, Ruti Teitel has criticized the deference of the European Court of Human rights to militant democracy in post-World

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266 *Id.* at 172.

267 *Id.*

268 *Id.* at 139.

269 *Id.*

270 *Id.*

271 Douglas O. Linder, *The 1924 Trial of Adolf Hitler (the "Beer Hall Putsch Trial")*, UMKC SCH. L. (2025), https://famous-trials.com/hitler/2524-the-hitler-beer-hall-putsch-trial-an-account [https://perma.cc/HTY4-4FT7].

War II Europe.[272] Teitel points out that by attributing extreme antidemocratic views to a movement or party that they do not explicitly or actively espouse and supporting suppression, judges enforcing militant democracy may in fact push these groups further to the margin, making them less likely to operate within the legal constitutional political mainstream, "precluding a compromise that is integrating or inclusive."[273]

CONCLUSION

The necessity of political trials in a system of divided or limited government is accepted by all the thinkers canvassed here. As is most explicitly stated by *The Federalist*, it is a basic law of politics in a republic that, from time to time, an ambitious politically influential figure will emerge who seeks in some way to break out from legal or constitutional restraints and subvert or usurp the legal and political order.[274] Straightforward impunity in such situations is hardly imaginable; it is simply not compatible with the overarching commitment to a divided government under the rule of law. But if political trials are necessary in this sense, they are also risky and prone to abuse.

Machiavelli, Montesquieu, Constant, Guizot, Tocqueville, and *The Federalist* contribute to an understanding of these risks and suggest institutional safeguards to address them. While the others may lack Machiavelli's general enthusiasm for political trials when properly designed, they accept such trials at least as an unpleasant occasional necessity. There is a symbolic importance in reinforcing the norm that no political figure in a republic is beyond the law and can exercise power outside the law. This helps to reinforce commitment to the separation of powers and limited government. At the same time, frequent elections,

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272 TEITEL, *supra* note 14, at 69.

273 *Id.*

274 *See* THE FEDERALIST NO. 51 (James Madison).

party pluralism, federalism, and even referenda may be more effective checks against political figures who set themselves above the law.

Among the thinkers examined here, there is extensive agreement that political trials should be transparent, that the public should be encouraged to follow them, and that the deciders should be, if not numerous, in some way representative of, or drawn from, the people—not merely professional judges appointed by political elites. At the same time, all but Machiavelli and Burke believe political bodies such as legislative assemblies should not be meting out criminal punishments. Making office holders accountable for misconduct through removal from office may properly be done by a political body, but the authority of such a body to mete out punishments on individuals, such as execution, imprisonment, or the forfeiture of property, could easily be abused for political ends. As we have seen in the case of Burke, and the impeachment and trial of Warren Hastings by the House of Lords, there are considerable risks in mixing judgments of political morality with determinations of individual criminal responsibility under law.

If a political trial is conducted with scrupulous adherence to ordinary legal procedures, popular juries should be fair-minded adjudicators of the facts, not swayed by partisan political or ideological considerations. Ideally, in political trials, the jury selection process should guarantee a degree of diversity and allow the accused to exclude jurors whom they may perceive to be politically or ideologically biased against them.[275] If we were to examine existing institutions against these precepts, they would stand up relatively well, at least on paper. In practice, they have faltered and occasionally produced the spectacle of illegitimate political trials, or trials in tension with the preservation of political freedom: the Sedition Act trials, the McCarthy era, and the prosecutions of 1960s radicals are all examples of such faltering.[276]

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275 *See* MONTESQUIEU, *supra* note 64, bk. XI, ch. VI, at 107.

276 *See, e.g.*, JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004); ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998); ROBERT M. LICHTMAN,

Overall, it is not unreasonable to expect that American institutions will be capable of producing trials in accord with the basic principles of political morality in a system of divided government. Of course, many on the Trumpian right who attack the decision to prosecute operate from a generalized or dogmatic cynicism about our institutions.[277] This view is all about who has power and uses it to advance their own agenda. Should we fear such cynics? Here, Kirchheimer's warnings, already in the 1960s, about "polarization" in the politics of mass society, may have been prescient.

Sam Issacharoff has argued that populists are a real threat to our democracy. A decision against prosecuting Trump out of fear that they will taint the trials as partisan-political would play into their hands and increase their dangerousness. So, on that basis, it was not wrong to pursue the indictments in accord with due process of law. As Issacharoff observes:

> Over the course of the 2020 election and its various challenges, the institutions responsible for election administration proved remarkably resistant to the demands of the Trump campaign to set aside voting totals or to declare the results illegitimate. . . . [W]hat should not be overlooked is the institutional resilience in the face of extraordinary pressures from President Trump and his acolytes.[278]

At the same time, the childlike glee with which some liberal circles in America reacted to the news of the Trump election indictments seems

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THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS (2012); Bruce A. Ragsdale, *The Chicago Seven: 1960s Radicalism in the Federal Courts*, FED. JUD. CTR. (2008), https://www.fjc.gov/sites/default/files/trials/chicago7.pdf [https://perma.cc/9Q4T-PDFZ]; LUCA FALCIOLA, UP AGAINST THE LAW: RADICAL LAWYERS AND SOCIAL MOVEMENTS, 1960S–1970S (2022).

277 *See* Bob Bauer, *The Rise of a New, Dangerous Cynicism*, ATLANTIC (June 18, 2024), https://www.theatlantic.com/ideas/archive/2024/06/new-cynicism-isnt-like-old-cynicism/678712 [https://web.archive.org/web/20250308040241/https://www.theatlantic.com/ideas/archive/2024/06/new-cynicism-isnt-like-old-cynicism/678712].

278 SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY 167 (2023).

at odds with the spirit of moderation counseled by those such as Montesquieu and *The Federalist* in the matter of political trials.[279]

Some fully believed that Trump could be defeated by lawfare, regardless of his popularity in the polls and potentially at the ballot box.[280] When the voters got to decide in November 2024, it was rightly understood within our institutions that continuing to pursue indictments and prosecution of Trump was unwise or at least impractical in the presence of his new and decisive political mandate.[281] Thus, there was a rapid response from Jack Smith—the special counsel appointed by the U.S. Department of Justice to oversee prosecutions related to January 6 and classified documents—in moving to withdraw the January 6-related charges.[282]

Today, liberal political commentators find it stunning and certainly disconcerting that the people would knowingly elect a convicted felon under indictment for many other offenses.[283] If one thinks of Loewenstein's observation concerning the legitimating power of "emotion" in mass democratic society,[284] this is hardly surprising and not really contradictory. This is not simply a phenomenon of the political right. Social democrat Brazilian President Lula da Silva was convicted and served almost two years in prison on corruption charges, but remained immensely revered and loved by much of the Brazilian population.[285] He is now back in power.[286] There is very strong evidence that the corruption

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279 *See* MONTESQUIEU, *supra* note 64; THE FEDERALIST NO. 69, *supra* note 21.

280 *See, e.g.*, Andrew C. McCarthy, *Why the Anti-Trump Lawfare Failed*, NAT'L REV. (July 20, 2024, 6:30 AM), https://www.nationalreview.com/2024/07/why-the-anti-trump-lawfare-failed [https://perma.cc/NT67-BL6K].

281 Tom Dreisbach, *Targets of Trump's Threats Brace for the New Administration*, NPR (Nov. 14, 2024, 4:00 PM), https://www.npr.org/2024/11/14/nx-s1-5183846/trump-presidency-retribution-enemies-threats [https://perma.cc/2M2V-SUWK].

282 Karlan & Ford, *supra* note 5 (discussing Smith's report on Trump's 2020 election interference).

283 *See, e.g.*, Baker, *supra* note 9.

284 *See* Loewenstein, *supra* note 28, at 423.

285 *See* Conci, *supra* note 18; PRONER, CITTADINO, RICOBOM & DORNELLES, *supra* note 161.

286 Conci, *supra* note 18; PRONER, CITTADINO, RICOBOM & DORNELLES, *supra* note 161.

charges against Lula were political and his initial trial was unfair.[287] But it is hard to believe that the eventual overturning of those convictions was entirely due to good lawyering as opposed to a large part of the population believing the charges to be false and seeking Lula's return.[288]

As the twists and turns of his account of Manlius Capitolinus show, while Machiavelli saw political trials as a manner of the people controlling the extralegal conduct of powerful, elite political figures, the people's response to those figures was more about whether or not their behavior undermined the people's common good, as opposed to its criminality as such.[289] The people executed Manlius when he transgressed against their interests, but then mourned him, as he had previously been their benefactor.[290] The exoneration of William Hastings in his trial in Parliament, as well as in the court of public opinion, despite a meticulously assembled body of evidence showing his corruption, belied Edmund Burke's high hopes that the trial would reset Britain's governance of India.[291] Hastings was perceived to be effective and patriotic, and his corrupt actions were somehow viewed as of secondary importance to that.[292]

As Kirchheimer emphasizes, political trials have proven an uncertain, usually ineffective means, of countering a political opponent or removing a popular leader from the political landscape.[293] In the case of activists or intellectuals expressing allegedly radical, dangerous, or illegal opinions, political trials are certainly a better alternative than detention or deportation without trial, as recent events have shown.[294] However, as Shklar underlines—following Montesquieu—all punishment of mere belief or opinion, however radical, risks

287 Conci, *supra* note 18; PRONER, CITTADINO, RICOBOM & DORNELLES, *supra* note 161.

288 Conci, *supra* note 18; PRONER, CITTADINO, RICOBOM & DORNELLES, *supra* note 161.

289 *See* MACHIAVELLI, *supra* note 32, at 115–16.

290 *Id.*

291 *See* DAVIS, *supra* note 162; DIRKS, *supra* note 163.

292 *See* DAVIS, *supra* note 162; DIRKS, *supra* note 163.

293 KIRCHHEIMER, *supra* note 218, at 229–30.

294 *See, e.g.*, Khalil v. Trump, No. 25-CV-01963, 2025 WL 1514713 (D.N.J. May 28, 2025).

undermining liberal constitutionalism, even if is intended to protect it against subversion (Loewenstein).[295] Necessary political trials should be undertaken with great attention to their risks. We should have modest expectations of what they can accomplish even where the rule of law is respected.

295 *See supra* notes 253–54.