

2005

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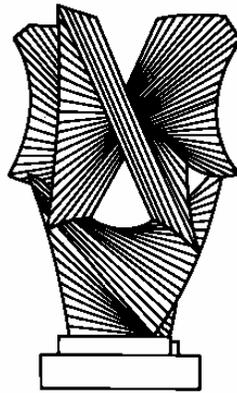
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Eric Posner, "Political Trials in Domestic and International Law" (University of Chicago Public Law & Legal Theory Working Paper No. 87, 2005).

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CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 87



POLITICAL TRIALS IN DOMESTIC AND INTERNATIONAL LAW

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**THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO**

April 2005

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series: <http://www.law.uchicago.edu/academics/publiclaw/index.html> and The Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract_id=707870

Political Trials in Domestic and International Law

Eric A. Posner¹

Abstract. Due process protections and other constitutional restrictions normally ensure that citizens cannot be tried and punished for political dissent, but these same restrictions interfere with criminal convictions of terrorists and others who pose a non-immediate but real threat to public safety. To counter these threats, governments may use various subterfuges to avoid constitutional protections, often with the complicity of judges, but when they do so, they risk losing the confidence of the public, which may believe that the government targets legitimate political opponents. This paper argues that the amount of process enjoyed by defendants in criminal trials reflects a balancing of these two factors: their dangerousness, on the one hand, and the risk to legitimate political competition, on the other hand. Political trials are those in which the defendant's opposition to the existing government or the constitutional order is the main issue. The paper discusses various ways in which governments and judges adjust process protections, so that a public threat can be countered while the risks to political competition are minimized. International trials are also discussed within this framework.

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Introduction

A political trial is a trial whose disposition—that is, usually, a finding of guilt or innocence, followed by punishment or acquittal, of a particular individual or (sometimes) group—depends on an evaluation of the defendant’s political attitudes and activities. In the typical political trial, a person is tried for engaging in political opposition or violating a law against political dissent; or for violating a broad and generally applicable law that is not usually enforced, enforced strictly, or enforced with a strict punishment, except against political opponents of the state or the government.

Political trials are uncommon in liberal democracies but not unknown. In the United States, political trials were conducted in the late eighteenth century, when Jeffersonians were convicted of violating the Sedition Act. Many people believe that trials for sedition during the Civil War, World War I, World War II, and the Cold War were political trials. And, recently, some have argued that future trials of suspected terrorists after September 11 will be political trials.

These political trials bear a family resemblance to trials of deposed leaders of enemy states, including the first Nuremberg trial of Nazi war criminals, the Tokyo trial of

Japanese war criminals, the trials of Slobodan Milosevic and other officials of the successor states of Yugoslavia, and the trials of perpetrators of the Rwandan genocide. These trials have all been political trials, although burnished with legalisms: the defendants are charged with legal violations but prosecuted because they are political enemies of the states that operate the tribunals. The legal foundation of the trials is either explicitly retroactive or based on very general international laws or principles that are selectively applied against defeated or compliant states. Although recent efforts to establish legal foundations for the trials of war criminals and dictators have resulted in the creation of the International Criminal Court, American opposition to this court ensures that in the near future such trials will continue to be political, rather than legal, institutions.²

Another related group of trials occur in transitional settings, where a democratic system succeeds an authoritarian system. These trials are not international because they take place within a single state and involve only the nationals of that state; but they are not ordinary domestic trials either because they straddle constitutional regimes, raising special problems of retroactivity. Transitional trials occurred or were seriously considered in, among other places, Poland, Czechoslovakia, Hungary, and Germany in the 1990s; Argentina, Uruguay, and Chile in the 1980s; Greece and Portugal in the 1970s; and France and other occupied countries after World War II. These trials were political because the defendants were tried for their participation in a despised government, not for any legal violations for which they could have been convicted during the old regime.³

Political trials of all types are heavily criticized, but some are more heavily criticized than others. Political trials in authoritarian regimes are objectionable, of course, but no more objectionable than authoritarianism itself. Political trials in transitional settings are understandable if sometimes regrettable. Because these trials are retroactive, they violate the rule of law; and to violate the rule of law during a transition to the rule of law seems unfortunate, even paradoxical. Still, some observers defend political trials in

² See the essays in *From Nuremberg to the Hague: The Future of International Criminal Justice* (Philippe Sands ed. 2003). The Nuremberg trials—and especially the first trial of major war criminals—are the subject of a large literature; see, e.g., Ann Tusa and Jon Tusa, *The Nuremberg Trial* (1983); Joseph E Persico, *Nuremberg: Infamy on Trial* (1994); Robert E. Conot, *Justice at Nuremberg* (1983).

³ Accounts of many of these trials are collected in *2 Transitional Justice* (Neil J. Kritz ed., 1995).

the transitional setting as a way of teaching the public a lesson about the evils of the old regime. Political trials in the international setting are open to the charge of victor's justice, but are often seen as expedients necessary to provide the foundation for an international criminal legal system. This was a common defense of the Nuremberg trial.

Political trials in liberal democracies, however, have virtually no defenders; they are reviled as a corruption of the judicial process and a betrayal of liberal principles. The standard view in the legal literature holds that (1) governments have strong incentives to limit process and attack their opponents; (2) judges are the guardians of due process rights as well as political rights such as free speech; (3) during times of emergency governments exploit public fears in order to crack down on dissent; and (4) judges should and do stand in the government's way—and when they do not, this is regrettable.⁴ The fatal defect in this theory is the absence of a plausible account of the motivations of the actors. Why would judges try to restrain the government, and why would the government allow itself to be restrained by judges? History shows that judges often enthusiastically facilitate political prosecutions, and that governments are perfectly capable of ignoring judges who do not.⁵

The thesis of this Article is that domestic political trials flow naturally from the highest obligation of liberal democracies: to defend themselves and, thus, their ideals—that is, liberalism and democracy—from internal and external enemies who refuse to submit to the constitutional system. Governments cannot counter all threats to the constitutional system without sometimes using measures that are inconsistent with

⁴ See, e.g., Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (2004); *The Constitution in Wartime* (Mark Tushnet ed. 2005); Judith Shklar, *Legalism: Law, Morals, and Political Trials* (1964); Michal R. Belknap, *Cold War Political Justice: The Smith Act, The Communist Part, and American Civil Liberties* 3-7 (1977); Victor S. Navasky, *Naming Names* (2003) (criticizing McCarthy era trials); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956) (criticizing founding era trials); Peterson and Fite, *supra* (criticizing World War I trials); Peter L. Steinberg, *The Great "Red Menace": United States Prosecutions of American Communists, 1947-52* (1984) (criticizing Smith Act trials). Hannah Arendt's criticisms of the Eichmann trial reflects the conventional wisdom about political trials, though she was apparently not opposed to a different kind of political trial, one conducted by an international tribunal rather than in an Israeli court. See Hannah Arendt, *Eichmann in Jerusalem* (1994). See also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131 (1991), although Amar emphasizes the role of the jury.

⁵ We will discuss many examples of the first in Part III.C.; Lincoln's refusal to obey Justice Taney's order in *Ex parte Merryman* is the preeminent American example of the second.

normal constitutional restrictions.⁶ The problem for a government that rests on public consent, as governments in all liberal systems do, is that if it counters the threat using extralegal means, then the public might believe that the government will use such means against its partisan political opponents as well as actual security threats. A public that believes that the government will eliminate legitimate political opponents will withdraw its support, depriving the government of its power.⁷ This dilemma cannot be avoided, but a well designed political trial reduces the tension between these competing forces by allowing the defendant qualified judicial process, enough—in the ideal case—to persuade the public that the defendant is a threat to the constitutional system rather than an ordinary dissenter, but not so much that the defendant will be acquitted. On this view, there is no normative objection to a political trial per se; only of political trials that target partisan opponents rather than public threats, and of political trials that target public threats but also erode public confidence in government to such an extent as to interfere with normal governance.

This argument has certain normative implications, which can again be contrasted to those of the standard view. The normative implication of the conventional wisdom is that judges should enforce political and process rights during emergencies more

⁶ Thus, this Article can be placed with recent work discussing how the president's powers should (or should not) change during emergencies. Compare Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *Yale L.J.* 1011 (2003) (arguing that the president should act lawlessly and then seek public ratification), and Bruce Ackerman, *The Emergency Constitution*, 113 *Yale L.J.* 1029 (2004) (arguing that the Constitution should be amended or interpreted so as to provide the president with emergency powers, subject to procedural constraints). My more modest point is that any time security concerns are heightened (whether or not there is a true "emergency"), process protections will be relaxed, and this relaxation can be done in a manner that is consistent with basic liberal, democratic principles, as long as one pays attention to the difference between suspects who are public threats and suspects who are mainstream political opponents.

⁷ My approach is thus to treat liberal principles—like legalism, the rule of law—as instrumental rather than ideological; this is very much in the spirit of Stephen Holmes, *Lineages of the Rule of Law*, in *Democracy and the Rule of Law* 19 (José María Maravall and Adam Przeworski eds., 2003) and Adam Przeworski, *Why Do Political Parties Obey the Results of Elections?*, in *Democracy and the Rule of Law*, supra, at 114. The approach is to ask, Why would the people with power—the wealthy, the well born, those with guns—be willing to commit themselves to the rule of law (Holmes), elections (Przeworski), and other liberal democratic principles? The answer is assumed to be that it lies in their self-interest, not in the "inherently binding power of norms" or "legitimacy" (Holmes, supra, at 24). See also Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *Amer. Pol. Sci. Rev.* 245 (1997) (presenting a model of politics in which the government exercises self-restraint in order to avoid sanctions from opposition groups); and, for a related approach by a legal scholar, Daniel A Farber, *Rights as Signals*, 31 *J. Legal Stud.* 83 (2002) (arguing that when states make constitutional commitments to protect human rights, and grant the judiciary independence to enforce them, they signal that they have a long time horizon, and therefore are unlikely to expropriate investments).

vigorously than they have in the past. Political trials are simply never justified; and judges should do all they can to prevent them from occurring.⁸

The normative implication of my thesis is that political trials are unavoidable and must be tolerated, but can be better designed and managed than they often are. The proper amount of process in the political trial trades off national security, on the one hand, and the credibility of the prosecuting authorities, on the other hand. In a nonpolitical trial, process has the main purpose of minimizing error and administrative cost. In a political trial, process has the additional purpose of maintaining the credibility of the government, or (what is the same thing) allowing the conviction of people who are public threats while preventing the conviction of people who are mere partisan political opponents. Because the credibility of the government is an issue, certain steps should be taken to enhance the government's credibility, and in the process to reduce the risk that the trial is being used for partisan purposes. These steps include involving judges and jurors from opposition parties, and allowing defendants to mount political defenses.

Part I provides the historical, legal, and academic background to the political trial. Part II explains why rational governments in a liberal democratic systems will sometimes conduct political trials. Part III discusses ways in which these trials can be designed and managed so as not to undermine the principle of political competition at the heart of liberal democracy. Part IV extends this discussion to related trials, including trials of enemy combatants, transitional trials, and international criminal trials.

I. Preliminaries

A. Historical Background

In the classic domestic political trial, the defendant is tried for opposing the government or ruling class. The political trial need not be based on retroactive lawmaking, though it often is. There may be an existing law that prohibits opposition to the government; if so, the defendant may be tried under that law and convicted. Such a trial is political, though all process rules may be observed, because the defendant's guilt or innocence depends on her political beliefs or activities. The reason that political trials are often retroactive, either in form or in fact, is that generally applicable laws forbidding

⁸ See, e.g., Stone, *supra*.

political opposition are highly unpopular, and frequently unworkable. A general prohibition of criticisms of the government is draconian in all but the most authoritarian states. Governments depend on criticism and, even when they do not, they are usually too weak to outlaw it. In democracies, legislators shy from laws prohibiting political opposition because the legislators know that these laws can be used against them if their party loses power. Even when the majority favors such laws, opposition parties may have enough strength in the legislature or in other institutions such as the judiciary to prevent the majority party from passing laws that have real force.

For these reasons, governments that seek to harass or eliminate political opponents through the judicial process usually resort to generally applicable laws against subversion, conspiracy, disorderly conduct, incitement to violate the laws, and so forth, but enforce them only against people who pose a genuine threat to their power or to public security, not against mainstream political rivals or ordinary citizens blowing off steam.

The domestic political trial can be located on a spectrum that extends from the summary execution or detention at one end, to the procedurally correct trial at the other end. At the one extreme, the government identifies and then captures or kills its opponents without informing them of the charges, giving them a chance to defend themselves, or involving independent agents such as judges. As one moves along the spectrum, one adds procedural protections: general, public, prospective substantive rules, the right to a trial, lawyers, judges, rules of evidence, rights to cross examine, jurors, and so forth. Military trials and deportation hearings fall at the midpoint of the spectrum; the ordinary criminal trial at the other end. As process increases, the government loses its power to disable its political opponents, but it gains something as well: the ability to claim credibly that its prosecutions serve the public interest rather than (solely) the government's interest in its own survival. Part II describes the logic of this theory in more detail.

As noted in the Introduction, not all political trials are domestic. Many are international, and others are transitional. Table 1 provides some historical examples of each type; the regular domestic trials are drawn from American history. Note that the

classification of many of these cases as “political trials” is controversial, and I include them only because they recur in the literature.⁹

Table 1: Political Trials¹⁰

Panel A: International

Year	Name	Result
1945	Nuremberg Trial	19 convictions (12 executions); 3 acquittals
1946–48	Tokyo War Crimes Trial	25 convictions (7 executions)
1993–present	International Criminal Tribunal for the Former Yugoslavia	30 convictions; 2 acquittals (through 2003)

Panel B: Transitional

Year	Name	Result
1649	Charles I	execution
1780s	American Revolution: Trials of Loyalists	various
1792	French Revolution: Trial of Louis XVI	execution
1944	French Trials of Nazi Collaborators	various
1974	Greek Trials of former government officials	convictions
1989	German trials of border guards and former leaders	convictions and acquittals

Panel C: Domestic (United States)

Year	Name	Charge ¹¹	Result
1798–1801	Matthew Lyon and other prominent Republicans	violation of Sedition Act	convictions in nearly every case

⁹ In particular, the Hiss trial does not seem political. Hiss was prosecuted for violating the law against perjury, and his trials (the first ended in deadlock) seem to have been fair. See Allen Weinstein, *Perjury: The Hiss-Chambers Case* 412-502 (1978) (describing the trials); the same is true for the Sacco and Vanzetti trial, and the trial of the Rosenbergs. But many people regarded these trials as political at the time because the defendants had radical political views, and they assumed that the government had trumped up charges in order to weaken political opposition. See David Caute, *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower* 61 (1978) (describing the public reaction to Hiss: “obviously guilty not only to conservatives but to Cold War liberals, obviously innocent, the victim of a frame-up to almost all who deplored the purge”).

¹⁰ For international tribunals, see Tusa and Tusa, *supra*, at 504 (Nuremberg); Richard H. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* 31 (2001) (Tokyo); James Meernik, *Victor’s Justice or the Law?*, 47 *J. Conflict Res.* 140, 154 (2003) (Yugoslavia tribunal). For Transitions, see Michael Walzer, *Regicide and Revolution* (1974); Kritz, *supra*. For American domestic trials, see *Political Trials in History: From Antiquity to the Present* (Ron Christenson ed., 1991); *American Political Trials* (Michal R. Belknap ed., 1994). On Sedition Act trials, see Smith, *supra*; on civil war trials, see J.G. Randall, *Constitutional Problems Under Lincoln* (rev. ed. 1951); on World War I era trials, see H.C. Peterson and Gilbert C. Fite, *Opponents of War, 1917-1918* (1957); on Smith Act trials, see Steinberg, *supra*; on the Haymarket trial, see Paul Avrich, *The Haymarket Tragedy* (1984); John F. Bannan and Rosemary S. Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (1974). Other sources are cited *infra*.

¹¹ When multiple charges were made, the main charge or a representative charge is listed.

1805	Impeachment of Samuel Chase	misconduct	acquittal
1807	Aaron Burr	treason	acquittal
1863	Vallandigham and other Southern sympathizers	violation of martial law	conviction by military commission; detention and exile
1868	Impeachment of Andrew Johnson	violation of Tenure of Office Act	acquittal
1886	Haymarket riot	conspiracy to commit murder, riot	conviction of eight defendants; execution of four; three were jailed, then pardoned
1918	Debs and other opponents of American involvement in World War I	sedition	convictions; some sentences later commuted
1918	Industrial Workers of the World (multiple trials)	conspiracy to obstruct World War I	mainly convictions
1919	Abrams and other anarchists	sedition	four convictions; exile
1921	Sacco and Vanzetti	murder	conviction, execution
1923	Garvey	mail fraud	conviction, deportation
1944	Dilling and other Nazi sympathizers	Smith Act violations	mistrial, then dismissal
1949	Dennis and other Communists	Smith Act violations	convictions
1949	Hiss	perjury	conviction
1950	Hollywood 10	contempt of Congress	convictions
1951	Rosenbergs	espionage	convictions, executions
1968	Catonsville 9	destruction of government property	convictions
1968	Boston 5	conspiracy to obstruct draft	convictions, reversed on appeal
1969	Chicago 8	incitement to riot	some convictions, reversed on appeal
1974	Wounded Knee	various offenses related to occupation of town	case dismissed after trial
1989–90	North and Poindexter	defrauding the government	convictions; North's was overturned on appeal; Poindexter was pardoned
1999	Impeachment of Bill Clinton	perjury and obstruction of justice	acquittal

There have been few international political trials of leaders or major officials.¹² For an international criminal trial to occur, a state must deliver up leaders for prosecution by another state or else suffer a decisive military defeat. But no state willingly yields its leaders, and throughout most of history victorious states saw no value in conducting trials of the leaders of vanquished states. Before the modern era, leaders were executed, imprisoned, exiled, or welcomed as guest-hostages. Tamerlane displayed Bayezid I in a cage after defeating him in the battle of Ankara in 1402. The Thirty Years War ended in 1648 with a settlement, and no leaders were tried or punished. Napoleon ended his days on the island of St. Helena. The War of 1812, the Crimean War, the Franco-Prussian War, and the Russo-Japanese War all ended in political settlements. Germany was decisively defeated in World War I, but the desultory efforts to prosecute Kaiser Wilhelm collapsed when Holland (sic!) refused to extradite him. Britain abandoned its efforts to prosecute Ottoman war criminals because it could not maintain control over Turkish territory.¹³ The pattern continued after World War II. Most wars ended in a political settlement or suspension of hostilities that failed to provide for trials; these wars included the conflicts between Pakistan and India, the conflicts between Israel and Arab states, the Korean War, the Vietnam War, the war between Britain and Argentina over the Falkland Islands, the Soviet-Afghan War, and the first Gulf War. The U.S. prosecuted Manuel Noriega for drug crimes after it ousted him from the helm of Panama, but this was a far cry from Nuremberg. The U.S. has no interest in prosecuting Saddam Hussein, preferring to leave him to the Iraqis, albeit with substantial U.S. assistance and influence as well.¹⁴ It is ironic that Nuremberg brought respectability to the political trial, as it has had virtually no value as a precedent for trying leaders of a state that has started wars, or

¹² Excluded are ordinary military trials of captured enemy soldiers or noncombatants who have committed war crimes. In some ways these are political trials, but in the main they are not: they are based on laws for which there is an international consensus.

¹³ See Gary Bass, *Stay the Hand of Vengeance* (2001).

¹⁴ The statute authorizing the trial passed only with the approval of the U.S.; and the U.S. has sent a team of attorneys to participate in the preparation of the trial. See Neil A. Lewis and David Johnston, *The Struggle For Iraq: War Crimes; U.S. Team Is Sent To Develop Case In Hussein Trial*, *The New York Times*, March 7, 2004, at 1.

holding international trials of war criminals.¹⁵ Only the Yugoslavia conflict, fifty years later, resulted in major war crimes trials before an international tribunal.¹⁶

Trials in transitional regimes, by contrast, have been common; Panel B lists just a few of the dozens that have occurred. The transitional or successor trial is intended to punish members of the old regime—to do substantial justice—and persuade the public that the old regime was evil so that the new regime will be seen as a legitimate replacement.

The most common type of political trial is that which occurs within a regime. Panel C is confined to the American experience, but it is important to remember that political trials are more common in authoritarian regimes than in liberal democracies because opposition to the government is usually illegal. Britain, France, and the other established democracies also have a long history of political trials.¹⁷ American political trials (or trials that are arguably political even if not obviously so) have occurred most often during times of upheaval: during the founding era, the Civil War, World War I, World War II, the height of the Cold War in the late 1940s and early 1950s, and the Vietnam War.

Many political trials are clearly identifiable as such because they involve laws that target people for their political views or the peaceful expression of those views. American examples include the trials of Jeffersonians under the Sedition Act at the end of the eighteenth century, and the trial of Vallandigham and other government opponents during the Civil War. However, most political trials in liberal democracies involve selective

¹⁵ Minow argues that Nuremberg inspired the trials of Adolf Eichmann in Israel, Argentina's prosecution of members of the military, Germany's border guard trials, and the trial of Jaruzelski in Poland, but, as she also notes, this claim is in tension with "the enormous gap in time between the Nuremberg trials and any comparable effort to prosecute war crimes in international settings." See Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* 27 (1998); see also the valuable discussion of Argentina's experience in Carlos Santiago Nino, *Radical Evil on Trial* (1996) (discussing relationship between Nuremberg trial and trial of Argentine leaders). Whatever the truth about Nuremberg, I have found no support in the historical literature for her claim that the Tokyo tribunal has had similar positive influence. *Id.* Most accounts of it are decidedly negative; e.g., the chapters in *The Tokyo War Crimes Trial: An International Symposium* (C. Hosoya et al. eds. 1986), especially the lucid introduction by B.V.A. Röling, one of the judges (B.V.A. Röling, Introduction, in *id.*, at 15). See also the historical accounts cited elsewhere.

¹⁶ There are a few other ambiguous cases, including the Rwanda and Sierra Leone tribunals.

¹⁷ France is responsible for one of the most famous political trials of all, the Dreyfus affair. For Britain's many contributions, see Peter Hain, *Political Trials in Britain* (1984).

enforcement of generally applicable laws against political opponents. Prosecution of political activists for loitering or disturbing the peace, when identical activities by political supporters or ordinary people are tolerated, is political. In these trials, defendants typically argue that they are being singled out for their political views, while the government argues that it is enforcing the law impartially. Examples include the Chicago 8 and Boston 5 trials, where prominent opponents of the Vietnam War were prosecuted under general laws prohibiting incitement to riot and conspiracy to obstruct the draft.

In many political trials, the political conflict is displaced to the facts. The defendant argues that the government has invented facts, or is manipulating evidence, in order to obtain a conviction of a political opponent for violation of a non-selectively enforced law. Sacco and Vanzetti did not argue that the government enforced the law against murder selectively, or that the law against murder was a political law; they argued that the government set them up. So did Alger Hiss and the Rosenbergs—all of whom denied that they engaged in espionage. These cases can be hard to distinguish from nonpolitical trials where an ordinary criminal defendant argues that the government set him or her up in order to show that it is tough on crime, or to appeal to racist or xenophobic sentiments of its constituents. O.J. Simpson could make this argument, as can any minority defendant who has a plausible claim that the prosecution is racist or politically motivated. In these twilight cases, the question comes down to whether the general public or relevant observers such as minority communities are receptive to the political defense.

Finally, one should note that trials are sometimes regarded as political trials simply because the law is controversial. Examples include trials for violation of sodomy laws, for murder where the defendant claims the battered-spouse defense, and for hate crimes. However, I exclude these cases from my definition because the trial is rarely about silencing a political opponent of the government or of the constitutional order.¹⁸

¹⁸ I also exclude trials in which the *government* tries to enforce a generally applicable law (say, against murder) but the *jury* nullifies the law and acquits a guilty defendant for political reasons. In so doing, the jury is licensing the murder of its political opponents. See, e.g., Dallin H. Oaks and Marvin S. Hull, *Carthage Conspiracy: The Trial of the Accused Assassins of Joseph Smith* (1975) (describing the acquittal of Smith's murderers by a jury consisting of anti-Mormon citizens). But, however objectionable, this is not

With so many kinds of political trials, reliance on simple definitions is hazardous. Nonetheless, one can identify the core meaning of the political trial. On this definition, a political trial occurs *when the government uses the judicial process against its opponents (including foreign enemies and internal dissidents) who have not violated formal, generally enforced laws or have violated only formal laws against political dissent*. This can happen when a formal law prohibits opposition to the government or the constitutional order that the government protects, in which case the normal judicial process rules can be respected, or when charges are trumped up, and the defendant is convicted of violating laws that she has not violated or that are very general and not enforced against people unless they are critics of the government. In the latter case, the conviction must occur with the complicity of the judge and/or jury; normal process protections are relaxed.¹⁹ Political opponents, as used here, include leaders and civilians of hostile foreign states as well as domestic partisans.²⁰

B. Literature

Most Americans prize this country's tradition of tolerance for political dissent, and the political trial would appear to have no place in such a tradition. Today, political trials are associated with various unjust or dubious events: trials of draft resisters and government critics during the Vietnam War, of harmless eccentrics or well-meaning dissenters during the Cold War, of labor organizers and peace activists during World War

a problem of the government trying to maintain its power by eliminating its political opponents, and thus outside the scope of this paper.

¹⁹ For a discussion of the relationship between trials to determine whether a person is an enemy combatant and the political trial is complex, see Part IV.A.

²⁰ My definition falls between the two extremes in the literature. Kirchheimer (*supra*, at 49) limits political trials to trials that have partisan motivations; Belknap includes the trial that "is intended to affect the structure, personnel, or policies of government, that is the product or has its outcome determined by political controversy, or that results from the efforts of a group within society having control of the machinery of government to use the courts to disadvantage its rivals in a power struggle which is not itself immediately political or to preserve its own economic or social position." Belknap, *American Political Trials*, *supra*, at xvi. This definition would require us to classify almost any trial as political. The definition I use excludes trials (fairly) based on laws that derive from the constitutional bargain; of course, if one thinks of the constitutional bargain as itself "political," then all trials are political, but then one can't make a useful distinction between routine criminal trials and the kind of troublesome trials that dominate the literature.

I. To say that a trial is political is always to condemn it. The mainstream literature on these events accepts this popular view.²¹

However, there has always been a counterpoint in the literature, stimulated by a signal event in the history of the political trial, the Nuremberg trial of major war criminals after World War II. Many commentators have been unable to allow their reservations about “normal” political trials to apply to Nuremberg, where a political trial seemed preferable to the alternatives—the release of the Nazi leaders on the ground that they violated no international law, or their summary execution on the ground that they were evil men and had lost the war. Thus, there is a tension: if the political trial at Nuremberg was desirable, then one must abandon the popular view that all political trials are objectionable. But if not all political trials are objectionable, what are the grounds for condemning the trials of dissenters in the United States?

This tension permeates Judith Shklar’s prominent discussion of the Nuremberg trial.²² Shklar defends the trial on the ground that it promoted the rule of law by applying the forms of legality to a novel set of circumstances. It was, in essence, a theatrical act of legislation. The trial also served valuable political ends by helping discredit Nazism in Germany and awaken German’s dormant legal traditions.²³ These arguments are in the service of Shklar’s main thesis, a critique of “legalism”—the ideology under which the rule of law becomes an end in itself rather than a means to the accomplishment of liberal values—and the legalistic view that all political trials are objectionable because they violate legal norms.²⁴

²¹ See *supra* note ____.

²² See Shklar, *supra*.

²³ By contrast, she viewed the Tokyo trial as a “dud,” because, in her view, Japanese traditions and culture were not receptive to Western style legalism, Shklar, *supra*, at 181, and that the Japanese simply did not behave as badly as the Germans—no crimes against humanity, only war crimes and crimes of aggression—and thus could portray themselves as moral equivalents of the victors. The first point is simplistic: Japanese ethical traditions differ in complex ways from Western ethical traditions but if her claim is that the Japanese were less likely to condemn the behavior of fellow citizens than the behavior of foreigners, this feature of their moral system would hardly distinguish them from the Germans or the Americans.

²⁴ Shklar, *supra*, at 156. See also Bernard D. Meltzer, “War Crimes”: The Nuremberg Trial and the Tribunal for the Former Yugoslavia, 30 *Valparaiso U.L. Rev.* 895, 907 (1996). Shklar’s arguments would be echoed in Michael Walzer’s defense of the trials of Charles I and Louis XVI, which, by symbolizing the end of monarchy, performed a valuable political function, the ushering in of democracy. See Walzer, *supra*. For a contrasting view, see Minear, *supra*, who attacks the Tokyo war crimes tribunal for violating the norms of legality. His view appears to be that enemy leaders should not be tried if they are “sincere men”; otherwise,

However, Shklar flatly denies that domestic political trials can have a valuable role in a liberal constitutional order.²⁵ Consider her analysis of Judge Hand's opinion in *Dennis*.²⁶ Rejecting the defendants' First Amendment challenge to their convictions under the Smith Act, Hand argued that Justice Holmes' "clear and present danger" test of the First Amendment was too narrow; Congress ought to have the power to address future dangers that are probable but not too remote. At the height of the Cold War, Hand believed that international, that is, Soviet-directed, communism posed just such a danger, and for that reason the conviction of the *Dennis* defendants was justified.

Shklar disagrees. Citing Justice Jackson's opinion on appeal, she argues that the political trial corrupts the judiciary:

The judicial process, Justice Jackson observed, is not designed to deal with radical political movements. It deals with individual offenders against law, not with the elimination of political groups. To attempt such tasks is to injure the judicial process, because the principle of legality cannot survive them.²⁷

This is an argument by definition: because the judicial process is designed to enforce the law, it cannot be used to eliminate political enemies. But why not? Why can't it do both? Indeed, Jackson concurred with the majority's affirmance of Hand's decision, apparently because he believed that the challenge posed by communism could be cabined as an international threat; judicial persecution of communists would not necessarily result in judicial persecution of legitimate, indigenous opposition groups.²⁸

The quotation above makes it appear that Shklar thinks that courts can convict people only for past acts and not on the basis of future threats, but she backs off from that position, which would be in tension with her critique of the legalist mentality, and instead

summary execution would be appropriate. *Id.*, 179-80. He appears to condemn Nuremberg as well (*id.*, at 169).

²⁵ See Shklar, *supra*, at 220.

²⁶ *United States v. Dennis*, 183 F.2d 201 (2nd Cir. 1950).

²⁷ See Shklar, *supra*, at 217.

²⁸ See *Dennis v. United States*, 341 U.S. 494, 561 (1951) (Jackson, *conc.*). That Communists ought to be granted a lower level of process was apparently a general view of the Supreme Court; see William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States* 2001 *Sup. Ct. Rev.* 375 (2001). This was also the view of Truman, who "was willing, as were some other liberals, to destroy the CPUSA in order to maintain basic liberties of all other citizens." Steinberg, *supra*, at 290.

argues that Hand was wrong about the facts. The threat posed by American communists was remote, not probable; therefore, it was wrong to imprison them.²⁹

If the mobilization of the judiciary were a necessary muting of law in time of war one would not complain, especially if this war, like those in the past, had a foreseeable end. However, the Cold War is not like that, nor does it require the abandonment of the principle of legality. This abandonment is a necessity conjured up by an abandonment of pragmatic liberalism and a paranoia created by an interminable, frustrating, and exhausting conflict.³⁰

Shklar thus adopts a legalistic solution to the problem of political trials: acceptable during wars with a foreseeable end, and not otherwise. This position is inconsistent with her critique of legalistic thinking. She ought to approve or disapprove of political trials just to the extent that they promote liberal values such as tolerance. Such liberal values, she concedes, can be promoted only in a society that is secure against external and internal threats. It follows that a political trial that improves security (such as at time of war, but not only then) may be justified. She disagrees with Judge Hand about the nature of the threat posed by the American communist party; it is only this disagreement about the facts, not a philosophical or analytical demonstration that the political trial during times of peace is inconsistent with liberal values, that drives her critique of *Dennis*.³¹

Indeed, one could argue that the *Dennis* case was less a political trial than the Nuremberg case. As I will discuss below, the promoters of the Nuremberg trial sought to persuade the world of the evils of the Nazi system, and the virtues of the allied states that opposed it. By contrast the *Dennis* trial was motivated less by partisan goals than by the belief that the American Communist Party was providing assistance to a dangerous foreign enemy.

²⁹ Shklar, *supra*, at 215.

³⁰ *Id.*, at 219.

³¹ History has been kinder to Hand than to Shklar. The disclosure of the Venona cables and the opening of Soviet archives in the 1990s revealed that the CPUSA was dominated by the Soviet Union and used for espionage purposes, although the effectiveness of the Soviet espionage network in the United States had been undermined by defections, counterintelligence, and purges by the end of World War II. See Allen Weinstein and Alexander Vassiliev, *The Haunted Wood* 339-44 (1999); Harvey Klehr, et al., *The Soviet World of American Communism* (1998).

Subsequent writings of political theorists have not departed much from Shklar's conclusions.³² Abel and Marsh, for example, argue that political trials may generate good political outcomes—the Supreme Court's contraction of libel law and expansion of rights of criminal defendants are among their examples—but they define political trial so broadly as to encompass virtually any case where the court's political views may play a role in the decision, hence virtually all constitutional cases decided by the Supreme Court.³³ In doing so, they lose sight of the classic trial against political dissent, which is the source of so much discomfort, and which they do not seem to defend. Christenson argues that a political trial brings “social contradictions” out in the open, where they can be discussed and acknowledged—but, whatever one thinks of this theory, it is hardly a reason for a government to conduct a political trial when it otherwise would have no such inclination.³⁴

The political science literature is valuable but excessively general. My concern is not with whether political trials may be justifiable in the abstract, but how government can lower process protections when justified by security concerns without generating suspicions that it is targeting its political opponents. This is a question of legal and institutional design.³⁵

³² Otto Kirchheimer's exhaustive book on political trials is mainly descriptive and analytical—he categorizes political trials, show how they work, the tensions, and so forth. His few normative comments seem to reflect ambivalence but the main tone is one of distaste. In this way he anticipates Shklar, though he does not draw her dogmatic line around political trials in liberal democracies. See Otto Kirchheimer, *Political Justice* (1961). Others have defended political trials in transitional settings; see, e.g., Bass, *supra* (2000) (arguing that war crimes tribunals may prevent victims from taking justice into their own hands); Walzer, *supra* (approving of the trials of Charles I and Louis XVI for establishing a symbolic break with monarchy).

³³ Abel and Marsh, *supra*.

³⁴ Christenson, *supra*.

³⁵ The legal literature is also mostly unrelated to the arguments in this paper. The post-World War II debates about positivism were inspired by political trials, such as the famous post-war prosecution of a woman who informed on her husband under Nazi rule in order to get rid of him. However, this political trial was the vehicle for investigating the concept of law, and the chief figures in the debate—Hart and Fuller—did not discuss how political trials should be conducted. Oddly, they both appear to think that the trial would be morally justified, with the main difference being that Hart thought Germany should pass an *ex post facto* law before prosecuting the woman while Fuller thought that the courts should declare Nazi law void and enforce the law that existed at the time of the Weimar Republic. Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593 (1958) and Lon L. Fuller, *Positivism and Fidelity to Law—A Reply To Professor Hart*, 71 *Harv. L. Rev.* 630 (1958). It is doubtful that their jurisprudential disagreements could explain this disagreement about means.

C. Legal Background

Political trials do not violate domestic or international law.³⁶ The U.S. Constitution expressly authorizes one type of political trial—the impeachment. Although article 2, section 4 says that the president and other civil officers may be impeached for “high crimes and misdemeanors,”³⁷ and one could argue that this means that they can be impeached only for criminal violations, the general view is that impeachment may be based on political expediency. The articles of impeachment of both Andrew Johnson and Bill Clinton included political as well as legal claims.³⁸ And many impeachments of judges have been based on political charges, such as that of undermining public confidence in the court.³⁹

The U.S. Constitution does not ban political trials of other public officials; nor does it say that such political trials can occur only through impeachment proceedings. It also does not ban political trials of ordinary citizens. A number of provisions, however, place severe limits on the government’s ability to conduct political trials.⁴⁰

The First Amendment is the basic constraint: it prohibits Congress from passing laws against political opposition in general, and thus from authorizing the prosecution of individuals solely on the ground of their opposition to government policy. However, in times of stress the courts have relaxed First Amendment constraints. During the Cold War the Supreme Court permitted a crackdown on the American Communist Party, in

Another literature focuses on the choices faced by transitional governments; see, e.g., Ruti Teitel, *Transitional Justice* (2002), Claus Offe, *Varieties of Transition: The East European and East German Experience* (1996). Posner and Vermeule, *supra*; Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997); Martha Minow, *Between Vengeance and Forgiveness* (1998). I will address some of the arguments in this literature in Part IV.

³⁶ I will discuss international law in Part IV.

³⁷ U.S. Const., art. 2, s. 4.

³⁸ See *Articles of Impeachment Against Andrew Johnson*, art. X (1868) (“... did attempt to bring into disgrace, ridicule, hatred, contempt and reproach, the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative powers thereof, (which all officers of the government ought inviolably to preserve and maintain.) and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted”); *Articles of Impeachment Against William Jefferson Clinton* (1998) (“William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States”).

³⁹ Raoul Berger, *Impeachment: The Constitutional Problems* 53-59 (1973).

⁴⁰ There are also political trials under the laws of the states, and various state constitutional and statutory constraints, which I will ignore. A few examples are discussed in Belknap, *supra*.

part because of its connection with the Soviet threat.⁴¹ The Supreme Court subsequently repudiated this line of cases but only after the Cold War had begun to thaw.⁴² Current doctrine holds that the government can target political opponents only if they cause harm in the course of their political activities (such as robbing a bank to finance their party) or pose an “imminent threat” to public order (such as inciting mob violence).⁴³

The main constraint on political trials in a legal regime in which overtly partisan laws are unconstitutional is the due process clause, which requires the judge to grant the defendant process rights. The great importance of the due process clause lies in its restrictions on simple fraudulent (or aggressive) conduct on the part of the executive. If the defendant has not violated any laws, not even generally applicable laws, the government may be tempted to cut procedural corners. At the extreme, the government fabricates evidence and bullies witnesses. None of this is unknown, but in the more common case the defendant’s legal guilt is ambiguous, and the government strengthens its case by withholding information from the defendant’s lawyer, forces him to confess to a crime he did not commit or manipulates him into such a confession, plays on the fears of the jury, and so forth. The various due process and related constitutional rights—to have a lawyer, to have a jury, to call witnesses, to examine evidence, to cross-examine witnesses—limit this kind of prosecutorial abuse.

The due process clause does *not* prohibit prosecutorial discretion: prosecutors are free to bring cases against X rather than Y, even though they committed the same crimes or even though Y’s crime is worse. The prosecutor might have any number of motives: resource constraints and difficulty of proof, the value of making an example of one defendant rather than another, and so forth. The Supreme Court has held only that the prosecutor’s motive cannot be invidious, and this typically means that the prosecutor

⁴¹ See *Dennis v. United States*, 341 U.S. 494 (1951).

⁴² *Yates v. United States*, 354 US 298 (1957); see generally *Belknap*, *supra*, at 157

⁴³ The current doctrine is there must be “imminent harm” (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)) but that has not always been the case, as discussed in the text above. In other democratic countries such as Germany, which proscribes the Nazi party, and Turkey, which periodically proscribes Islamic parties, there is no such requirement. See John E. Finn, *Electoral Regimes and the Proscription of Anti-democratic Parties*, in *The Democratic Experience and Political Violence* 51, 70-74 (David C. Rapoport and Leonard Weinberg eds., 2001) (listing these proscriptions as well as those in other countries); Walter F. Murphy, *Excluding Political Parties: Problems for Democratic and Constitutional Theory*, in *Germany and Its Basic Law* 173, 180-87 (Paul Kirchhof and Donald P. Kommers eds., 1993).

cannot have racist motives (for example) or the motive of punishing a defendant for asserting a legal right in a prior case. Although bringing prosecutions for political ends would probably violate the equal protection clause, courts are so deferential—they require that proof of the government’s motive rather than just a pattern of prosecuting political opponents who happen to violate general laws—that there is no discernable restriction on this practice.⁴⁴

A final important constraint on the political trial in the U.S. is structural. The separation of powers requires, in most cases, some degree of cooperation among all three branches if a political trial is to succeed. Congress can block political trials by declining to enact laws that target political opponents, refusing to enact very general laws that can be selectively enforced against political opponents, and defunding or otherwise constraining executive branch officials and judges who favor political trials.⁴⁵ The executive can undermine political prosecutions authorized by Congress by refusing to pursue them with zeal, or, where authorized, by establishing regulations that constrain its own officials.⁴⁶ The judiciary can undermine political prosecutions by throwing up procedural barriers such as burdens of proof, refusing requests for secrecy, and interpreting the constitutional provisions mentioned above in an expansive fashion.⁴⁷ As each institution wants to protect itself, and as each institution (except for the presidency) is always staffed by members of both parties, political trials (at the federal level) of members of mainstream parties are rare. Instead, political trials have been conducted

⁴⁴ See Teah R. Lupton, *Prosecutorial Discretion*, 90 *Georgetown L.J.* 1279, 1286-87 & n. 651 (2002) ; e.g., *Wayte v. United States*, 470 U.S. 598 (1985) (upholding prosecution of draft resisters selected because they had expressed intention not to register); *U.S. v. Hastings*, 126 F.3d 310 (4th Cir. 1997) (upholding prosecution despite prosecution memo that identified defendant’s political party). See generally *United States v. Armstrong*, 517 U.S. 456, 463-66 (1996) (describing the high standard for asserting a selective prosecution claim).

⁴⁵ However, various administrations have argued that the president’s Article II powers authorize him to detain and try enemy combatants without congressional authorization. The Supreme Court has, so far, declined to express a view on this argument; see, for its most recent statement, *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004).

⁴⁶ A good example of this is the foot-dragging of the Acting Secretary of Labor during the Red Scare of the 1920s; also, Attorney General Biddle’s reluctance to enforce the Smith Act during World War II, except when prodded by Roosevelt. See Belknap, *supra*, at 38-40.

⁴⁷ E.g., *Yates v. United States*, 354 U.S. 298 (1957), which narrowed the Smith Act. Even before *Yates*, many trial judges declined to impose the maximum penalty for Smith Act violations; see Belknap, *supra*, at 158.

mainly against people whom *both* parties regard as political opponents, usually extremists at both ends of the political spectrum.⁴⁸

All of what has been said so far is confined to the American experience; political trials in other constitutional democracies are usually not as heavily regulated by constitutional provisions or tradition. The impeachment power was frequently used by the British parliament in its historical efforts to rein in the King; these political trials are generally thought to have enhanced liberty and the rule of law, because they were used against the person who posed the chief threat to them. Impeachment was also a powerful tool against official corruption in all parts of government. This history influenced the drafters of the American constitution, who included the impeachment power in part as a bulwark against the feared monarchical tendencies of a president, and in part as a lever against corruption.⁴⁹

Much has been written about impeachment recently, and so my focus will be on the normal criminal trial in the American system, when it is used for political ends.

II. Theory

A. Liberal Legalism

Legalism is the view that courts should resolve social conflicts by applying preexisting rules to the conduct of individuals, who are given an opportunity to defend themselves. The defendant has a right to make a defense, call witnesses, cross-examine witnesses, have an impartial judge and jury, and so forth. This package of rights is known collectively as the right to due process. Legalism can be understood as the view that the right to judicial process is paramount, and should never be violated, or only in the most unusual conditions.⁵⁰

⁴⁸ Including the American Communist Party (Dennis, *supra*) and the Ku Klux Klan (e.g., *Bryant v. Zimmerman*, 278 U.S. 60 (1928) (upholding state law that required KKK member to register with state)). The view that reconstruction era trials of KKK members were political is defended in Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872* (1984) (arguing that the trials were used to consolidate Republican power in the South); however, Hall's definition of political trial is broader than that used here.

⁴⁹ See Berger, *supra*, at 7-52; Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America, 1635-1805* (1984).

⁵⁰ Legalism is more or less synonymous with the notion of the rule of law. On this, see the essays collected in *Democracy and the Rule of Law*, *supra*.

Legalism is not incompatible with laws against political opposition. A law that bans criticism of the state or government is such a law; a court could enforce the law without violating the right to judicial process as long as the defendant is given the opportunity to defend himself. Thus, an authoritarian state can have legalistic institutions, as Germany did prior to the Nazi era. The joint commitment to legalism and political tolerance is “liberal legalism,” which includes the idea that courts should not permit the government to ban political speech or opposition except when it causes immediate harm—for example, incitement to riot.⁵¹

Political trials cannot occur in a regime of liberal legalism as long as legal institutions uphold this ideal. Most real democracies only approximate liberal legalism; they sometimes enact laws against political opposition. But the more common type of political trial occurs when process is relaxed in violation of the ideal of legalism so that general laws that do not target political opponents can be used as a pretext for doing just that.

From the perspective of liberal legalism, such trials are illegitimate unless, as Shklar suggests, there is something like a state of war or civil insurrection.⁵² Shklar allows liberal states to relax their own principles in order to defend themselves, but as noted above, she tries to place this exception within a legalistic framework. If a court determines that a state of war exists, then it might relax the rules of process or defer to executive action such as the establishment of military commissions.⁵³ Why shouldn't courts relax process if a substantial threat short of war exists? Shklar insists that such thinking is “utopian” and unpragmatic, and that courts should not be involved in deterring mere threats. But she does not persuasively explain why relaxing process in this way violates liberal principles.

⁵¹ This seems to be Shklar's view with respect to the domestic setting, which puts great weight on the harm principle. Shklar, *supra*, at 60-70.

⁵² *Id.*, at 219-20.

⁵³ The lure of legalism remains, however, as can be seen in the judicial response to the war on terror. For example, contrast the government's view that it can classify individuals, including Americans, as enemy combatants with virtually no judicial oversight (a view endorsed by Justice Thomas in his dissent in *Hamdi*, 124 S.Ct., at 2683), and detain them for the duration of hostilities; and the *Hamdi* plurality's view that a person classified as an enemy combatant is entitled to due process protections if he wishes to contest the classification. *Id.*, at 2645-52.

B. An Instrumental Theory of Liberal Legalism

Academic defenders of liberal legalism normally provide philosophical justifications for this system, arguing that liberal legalism—also called liberal democracy, or constitutional democracy, or the rule of law, depending on whether more emphasis is put on liberalism or legalism—promotes welfare or fairness, or respects human dignity, or maintains social peace more effectively than alternative systems.⁵⁴ Without expressing a view on these approaches, I will take a different approach that emphasizes rational choice on the part of individuals or groups with power. I approach liberal legalism not as a system of values imposed on the government, but as a reflection of the principles and attitudes that would be taken by a rational government in a democratic system, one that seeks to maximize its political support.⁵⁵

A government, as I will use the term, consists of the people who control the policy and activities of the state. In a parliamentary system, the government is typically controlled by a single party or a coalition of parties; the opposition, then, consists of the party or parties that are out of power. In a presidential system, the government is typically controlled by the president's party, but the president may be forced to share power with opposition parties if they control the legislature. In any event, I want to distinguish, very roughly, the "majority party" or "party in power" from the (mainstream) "opposition party." In liberal democracies, the various mainstream parties compete for power within a legal framework; the opposition party is never outlawed or forced to suffer legal disabilities. In some democracies, extremist parties may be outlawed or regulated; in others, they may be able to share power.

I assume that the government's main goal is to stay in power, and that a party's main goal is either to maintain power (if it has it) or obtain power (if it does not). All political actors know that they cannot maintain power unless they implement policies desired by the general public, including (but not exclusively) their political base. One such policy is security, broadly conceived. Virtually every member of the public seeks

⁵⁴ See the essays in *Eternally Vigilant: Free Speech in the Modern Era* 32 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

⁵⁵ This is roughly the approach of Holmes, *supra*, and Przeworski, *supra*.

security both against internal threats such as those posed by criminal activity and against external threats such as invasion by hostile foreign countries.

It might seem that the best way to deter crime is to deny all rights to criminals, and simply seize and punish anyone who has committed a crime. Once the police have satisfied themselves that a particular person committed a crime, they would punish him, without going through the risky and tedious business of a trial. The usual objections to this approach are that trials promote fairness and accuracy, and prevent the government from arresting and convicting people who are vulnerable but did not commit any crime, so as to make a show of responding to the public's fear of crime without having to expend resources on a criminal investigation. But these objections are not persuasive. If the government cannot keep criminal behavior at a low level, it will lose public support. If law enforcement routinely convicts the wrong people, then criminals will be encouraged rather than deterred. And if people care about the fairness of criminal procedure, then the government has no reason to use unfair procedures.

The main problem with denying procedural protections to criminal defendants is that without such protections the government can use its monopoly on force in order to harass, detain, or eliminate its political opponents. Authoritarian countries, in fact, frequently do this; but liberal democracies do not. Why not?

The tempting answer is "the courts": independent courts prevent governments in liberal democracies from suppressing political opposition. The problem with this answer is that authoritarian countries have courts, and many liberal democracies do not have independent courts. The answer also begs the question why governments bent on suppressing political opposition don't push courts out of their way; this is exactly what happens in weak democracies. The question, then, can be reframed, as follows: why do governments in liberal democracies with weak courts restrain themselves from suppressing political opposition, and why do government in liberal democracies with strong courts restrain themselves from undermining the courts so that they can suppress political opposition?

The better answer is that a government that depends on the consent of the public cannot take the risk of allowing the public to think that the government eliminates

political opponents who enjoy the support of at least some of the public. Any particular criminal defendant may be an ordinary criminal, but he may also be an attractive political target because he leads or belongs to the opposition party, or he or his activities have symbolic importance for the opposition party. The public, especially the leaders and members of the opposition political party, will sometimes not know with confidence whether the government targets a particular criminal defendant because he has actually committed crimes or poses a threat to security, or because he poses a mere political (or partisan) threat to the government or party in power. If the public does not know whether the government uses its monopoly on power to target political opponents, or believes that it does, it may withdraw support from the existing government, and look for alternatives. The reason is that a government that uses force against opponents rather than criminals is not providing maximum security, and indeed may be pursuing policies that benefit the government itself or its circle of supporters rather than the public at large.

The problem is one of asymmetric information, and the historic solution in Western states is liberal legalism. There are two points, here. First, liberalism forbids the illegalization of political opposition, and its manifestation as formal law is freedom of speech, freedom of association, and the other basic political rights. A government that voluntarily consents to laws that protect opposition parties has taken the first step toward showing that it is a government that serves the public interest, a government that will maintain its power not by intimidating political opponents, but by creating good policy that pleases the public, which will reward the government by returning it to power.

Second, legalism ensures that the government will not circumvent the basic political rights through subterfuge. The judicial process forces the government to show that the defendant is an actual criminal or public threat, and not just a political opponent. The government must show that the defendant has violated a law, that is, a rule with democratic credentials. The government must persuade an independent judge and jury that the defendant violated the law. Rules of evidence and publicity ensure that the public can evaluate the government's case. Legalism prevents the typical subterfuge by which a government targets a political opponent not by eliminating him or outlawing his party but by accusing him of committing a crime that he did not commit, or a crime that is not generally enforced.

None of this suggests that a government will always adopt liberal legalism, or that liberal legalism is necessarily self-perpetuating. If a government believes that its political opponents are powerful, and likely to win the next election, the government might think that it has little to lose by prosecuting them. In unstable democracies, this is a common occurrence. In the United States, this occurred only once—and while it was still an unstable quasi-democracy—during the Sedition Act trials of the late eighteenth century, when Federalists used the judicial process to fend off political attacks by Republican newspapers.⁵⁶ In stable democracies, the reason that such trials do not occur more often than they do is that the reputational cost is so high: a government that prosecutes its political opponents will lose public support. Indeed, in the U.S., the Sedition Act prosecutions backfired, made martyrs of Republic writers and editors, and contributed to the defeat of the Federalists. The experiment would not be repeated.⁵⁷

In sum, governments grant judicial process and refrain from banning political opposition as a way of showing that their policies are in the public interest. When this kind of self-restraint becomes entrenched in a society, we say that the state is both liberal and legalistic. A government that goes to the trouble of eliminating its political opponents does so only because it fears that these opponents are likely to attract followers, which can be the case only if a large segment of the public can be persuaded that the government's policies do not benefit it or are otherwise wrong or unjust. If this is the case, the elimination of political opponents—however attractive for narrow political reasons—is likely to give rise to the inference that the government's policies are bad, and thus result in a loss of political support.

This theory is not incompatible with the philosophical view that political rights and judicial process are necessary because of fairness or the need to show respect for human dignity. Indeed, the instrumental theory of liberal legalism shows why a power-maximizing government will adopt liberal policies that many people find attractive on normative grounds. It thus shows why liberal legalism is politically robust, why

⁵⁶ Smith, *supra*.

⁵⁷ *Id.*, at 431. Smith provides specific examples that show that defendants convicted of Sedition Act violations often became heroes; in one case, the defendant was an elected official who was rewarded with reelection after he was released from prison. See, e.g., *id.* at 238, 241, 244, 274, 395.

governments sometimes voluntarily introduce liberal reforms, and why liberal legalism can be attractive to governments in societies (such as Japan) that do not have a long liberal tradition but instead emphasize the collective good. The theory also shows why liberal legalism faces limits, the subject of the next section.

C. Departures from Liberal Legalism: Political Trials

If liberal legalism has instrumental value for governments in the way that I have described, then governments will be tempted to depart from liberal legalism under two conditions. First, the government faces an unusually dangerous threat that cannot be adequately addressed within the existing legal framework. Second, the government enjoys an unusually high level of trust among citizens, so that it need not worry too much about creating suspicions by denying process in selected cases.

As to the first point, a government knows that if it cannot protect the people, they will eventually withdraw support. So its priority is security. Threats to security can be purely internal but can also be external. The normal internal threat is everyday crime. Most governments can keep crime at tolerable levels without departing from liberal legalism. To be sure, the norms of legal liberalism are not rigid, and are relaxed or tightened incrementally as circumstances warrant. When crime increases as a result of an exogenous shock—new drugs, new technologies—authorities almost always pass laws or take actions that depart incrementally from liberal legalism. The drug crisis stemming from the spread of crack cocaine led to a relaxation of liberal legalism across several dimensions: (i) vague laws that enabled prosecutors to target the most dangerous criminals; (ii) broad complicity rules that enabled prosecutors to reach all members of a drug gang; and (iii) anti-association laws that enabled police to prevent congregation of gang members on the street.⁵⁸ But the more significant test of liberal legalism is terrorism or domestic insurgency, and here most liberal states have departed much farther from liberal legalism, usually for the duration of the crisis, by claiming broad powers to be exercised only against the terrorist threat.

⁵⁸ There is a large literature on this; see, e.g., Harry Litman, *Pretextual Prosecution*, 92 *Georgetown L.J.* 1135 (2004) (vague laws); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *Geo. L.J.* 1153 (1998) (gang loitering laws).

Even more important is the external threat. During wartime, virtually all legal protections may be suspended and military rule imposed, depending on the extent of the threat. In the United States, the Civil War resulted in the suspension of habeas corpus; World War I in aggressive sedition laws; and World War II in martial law in Hawaii and the relocation of Americans of Japanese ancestry on the mainland.⁵⁹ Soviet led international communism furnished ample reason, in the minds of American authorities, for relaxing liberal legalism in the 1920s and again in the 1950s. Today, Islamic terrorism is the chief external threat to American security, and the excuse for relaxing process protections.

As to the second point, when people believe that the government does not seek to eliminate its opponents, they are more likely to tolerate reductions in process. The reason is that although reducing process may enhance error, it will not disadvantage opponents or entrench the existing authorities. One common method that governments use to enhance trust during emergencies is to invite political opponents into the government itself. Parliamentary systems often produce war cabinets with representatives from the party that is out of power. In the United States, the most famous example is the participation of the Republicans Stimson and Knox in Roosevelt's cabinet during World War II. Members of the opposition political party with knowledge of the internal workings of the government can be expected to raise a fuss if they discover the government is using its emergency powers to persecute their colleagues and supporters.⁶⁰

Let me put the argument in a more stylized form. Suppose that the possible defendant in a criminal trial—aside from ordinary criminals—may be either a “public threat” or a “political opponent” of the government. A public threat is a person such as a terrorist who is likely to harm the general public or the constitutional system; a political opponent is a person who poses a threat to an existing government but not to the public—

⁵⁹ See Stone, *supra*, for a recent discussion.

⁶⁰ In the United States, the executive branch might also seek broad support from Congress, as emphasized by Samuel Issacharoff and Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, in *The Constitution in Wartime*, *supra*, at 161, and by Cass Sunstein, *Minimalism at War* (unpub., 2005). However, given that the problem of distrust is partisan rather than institutional, I would argue that it was more important for Roosevelt to appoint the Republicans Knox and Stimson to his cabinet than for him to obtain the acquiescence of the Democratic Congress.

the case of normal political opposition. Because the public threat has not committed any crime, she cannot be convicted of a crime if given normal, that is, “high,” process. Assume that she can be convicted if given “low” process.

The dilemma faced by the government is that if it uses high process, then people who are public threats, or are suspected of being public threats, are acquitted and set free; they engage in terrorist attacks or support subversion; and the public reacts by saying to the government, “if you cannot protect us, we’ll find another [less scrupulous] government that will.” The government might, with the acquiescence of the courts,⁶¹ rationally grant a low amount of process in response so that it can convict more public threats. At the same time, the government knows that if it uses low process, the public will begin to suspect that the government may be targeting political opponents. And as long as the public assumes that the government is using low process in order to eliminate political opponents, the government has nothing to lose and much to gain from actually doing so.⁶² Still, the public might rationally tolerate low process if the public threat is serious enough, that is, if it is willing to give government a free hand to defeat the public threat even if the government will use the same powers to weaken its political opposition. If the government goes too far, however, it risks a withdrawal of public support.

There may be other ways for government to finesse these difficulties. Instead of granting low process to all criminal defendants, it can offer high process to “ordinary” criminals and low process to a class of people whom the public believes more likely to pose a real threat. The American government, in fact, has done this quite frequently, granting lower process to aliens, people who openly identify themselves with extremist groups (Communists, Islamic fundamentalists), and enemy soldiers.⁶³ These people may also be subject to greater surveillance than ordinary citizens are. The government can also grant higher than normal process to people who belong to mainstream opposition parties; this helps avoid the inference that the government’s motives are narrowly political.

⁶¹ I will discuss later the extent to which governments can expect judges to acquiesce in this way. See Part III.C.. For now, assume that judges will do what they think the government wants them to do.

⁶² See Finn, *Electoral Regimes*, supra, at 66. Discussing the World War I trials, Peterson notes that “it is a fact that almost immediately after the beginning of World War I people of the political right used the war as an excuse to attack people of the left. They did so by accusing leftists of being disloyal.” Peterson, supra, at 45. See also *id.*, at 213-21 (discussing the way the Sedition law was used against leftist groups).

⁶³ This was Justice Jackson’s argument in *Dennis*. See supra note ___, and accompanying text.

To summarize the argument thus far, we can imagine the following sequence of events. First, some emergency or apparent emergency occurs, and the public demands protection against the real or imaginary threat. Second, the government responds by reducing procedural protections. At one extreme, it might suspend habeas corpus and declare martial law. But the reduction of procedural protections can take subtler forms: the enactment of new laws, or the invocation of long dormant laws, that target seditious, disloyal, or dangerous behavior; reliance on newly broad interpretations of existing laws so that they may be used against the perceived threats; refusal by judges and juries to give certain types of defendants the benefit of the doubt; relaxed evidentiary standards; restrictions on defense lawyers' access to their clients. Third, the government now has greater freedom of action, which it can use against political opponents as well as the people who pose the new public threat. A rational, power-maximizing government will use its freedom of action to pursue both types of person. Fourth, the public realizes that the government can use its freedom of action against partisan opponents as well as public threats. The public may partially or fully withdraw support from the government because it fears political persecution of marginal or even mainstream political opponents of the government; but it also may accept this reduction in political competition as an acceptable price to pay for enhanced security. Defendants in criminal trials will exploit this public unease, and claim to be political opponents (when such a claim is plausible) whether or not they in fact are. Critics of the government will call these trials "political trials."

At this point, it might be useful to return to the definition of the political trial. "Political trial" is usually used as an epithet, and so it is tempting to stipulate that a trial is political only if the government uses its freedom of action to target political opponents rather than genuine political threats. Partisan trials are almost always objectionable because they violate the principle of political competition at the heart of liberal democracy. We could adopt this narrow definition of political trial; but then we would need a word for criminal trials of defendants who are not mere political opponents but in fact public threats—threats to the entire constitutional system or to the well being of many people—who have not committed ordinary crimes. The better approach is to use a broad definition of political trial, a definition that encompasses both the partisan trial of

political opponents, and the more public-spirited trial of public threats. The reason is that the latter type of trial violates the rule of law: it is political, not legal, albeit political in the broader, less objectionable sense—a matter of (possibly wise) policy rather than a vindication of the law. A further reason for using the broad definition is that most relevant trials fall between the two extremes: the anarchist, Communist, or Islamic terrorist are both political opponents in the narrow sense, and also threats (even if remote and long-term) to the constitutional system. And the final and decisive reason for using the broad definition is that the political trial (in the broad sense) provides institutional design challenges that the ordinary criminal trial does not. For example, a judge who presides over political trials might appropriately change the rules of process in order to interfere with partisan prosecutions while permitting convictions of public threats.

Political trials can be contrasted to show trials. Show trials were conducted by Nazi Germany and the Soviet Union, and by many Soviet satellites. Defendants were tortured or threatened off stage, then at trial would confess to whatever crimes the government charged them with, so as to avoid being tortured or shot afterwards, and to spare their families the same fate. The defendants were, in effect, unpaid actors in a propaganda film. Show trials cut the Gordian knot: governments eliminate partisan opponents as well as public threats without losing public support through the simple expedient of pretending that they grant process protections when they are doing nothing of the sort. If the public believes the government, its problems are solved.⁶⁴ But the pretense cannot be maintained indefinitely even in an authoritarian state, and show trials usually stop after a few years. Show trials are not an option in an open society because they would require the collaboration of people with different political views and goals—

⁶⁴ Some people might argue that the purpose of show trials was to instill fear and intimidate the public, which was supposed to know that the defendant's confession was the result of torture, and thus that torture was the punishment for political opposition. This is, at best, a small portion of the truth: disappearances or, for that matter, overt violence against political opponents would have served (and did serve) the purpose of intimidation. The great show trials in the Soviet Union had the specific purpose of discrediting Stalin's opponents, intended for foreign as well as domestic audiences (foreign journalists were invited to attend the trials). The trials did not fool everyone in the West, as the charges were often absurd, and some of the facts asserted in the trials could be checked out and disproved; but they did fool many influential people in the West, including politicians, journalists, artists, and intellectuals. See Robert Conquest, *The Great Terror* (1990), for example, *id.* at 91 (describing foreign observers at the trial of the old Bolsheviks), 105-08 (describing the Western reception of the trial), 463-76 (describing the Western reaction to all of the trials of the 1936-1938 period).

prosecutors, judges, lawyers, juries—or else the wholesale destruction of existing institutions which itself would alert people of the government’s intentions.⁶⁵

D. Summary, Evidence, Implications

Liberal legalism is an instrumental strategy used by governments to maximize political support in societies that have a general interest in security but tolerate normal political opposition. Liberal legalism enables the government to minimize internal threats to public security to the largest extent possible, consistent with the need to reassure the public that it will not maintain its power by harassing political opponents. When security threats increase, governments depart incrementally from liberal legalism because the public now is willing to tolerate a marginal increase in the harassment of (usually extreme) political opponents in return for greater security. As a result, political trials occur. These trials will target both authentic public threats and partisan political opponents. If the gain in security is large enough that the public as a whole benefits even though the government itself can increasingly use political trials to enhance its own power, then erosion of liberal legalism is likely to be tolerated, at least for the duration of the emergency.⁶⁶

The history of political trials in the United States supports the thesis that in a liberal democracy, political trials are more likely to be (politically) successful when defendants are extremists than when they are mainstream opponents. The Sedition Act trials of Jeffersonian Republicans were a spectacular failure: rather than destroy the Republicans, they destroyed the Federalists. Another example is the failed impeachment of U.S. Supreme Court Justice Chase in 1805, this time at the instigation of Republicans, against a Federalist justice.⁶⁷ These failures helped establish the legitimacy of political

⁶⁵ There is a sliding scale, and some devices used in a political trial can make it hard to distinguish from a show trial. In France, the “amalgam” was a device for associating a political opponent with ordinary criminals with whom she never conspired but shared some superficial similarity. One trial in 1894 brought together some anarchists whose offense was only political with ordinary criminals who would justify their crimes using anarchist rhetoric but who otherwise had no association with the political defendants. See Kirchheimer, *supra*, at 196 & n.40. The fiction here was more than the court could tolerate.

⁶⁶ A complementary philosophical treatment can be found in John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1991), who argues that during emergencies the commitment to constitutionalism can be maintained, even as a particular constitution’s requirements are evaded, as long as certain elemental requirements of constitutionalism—reason, deliberation, etc.—are satisfied.

⁶⁷ A more ambiguous example is the trial of Aaron Burr for treason in 1807. See Christenson, *Political Trials*, *supra* at 47-50. Burr was a political enemy of Jefferson, but by 1807 he probably could not be

competition between mainstream parties in the United States:⁶⁸ the implicit bargain—that the judicial process will not be used against mainstream partisan opponents—has held, more or less, for 200 years.

Subsequent political trials can be divided in two categories. First, there were trials of people who had virtually no mainstream political support: anarchists, Nazi sympathizers and Communists. Although the trials of these people often took place in a circus-like atmosphere, the evidence suggests that the public approved of the trials and convictions, and that the political standing of the government improved as a result of them.⁶⁹ Second, there were trials of people whose views were somewhere between moderate and extreme: opponents of the Civil War, World War I, and the Vietnam Wars. These trials were only moderately successful, as one might expect. Civil War-era military trials of dissenters may have maintained order but were highly controversial and politically damaging.⁷⁰ World War I-era espionage and sedition prosecutions were popular and may have helped the war effort, but they also enhanced the prestige of radical politicians like Eugene Debs.⁷¹ Vietnam War-era prosecutions like the Chicago 8 trial seem both to have discouraged violent protests and to have weakened support for the national government and its policies.⁷²

The refusal to use political trials as a routine weapon against political opponents, reserving its use for serious public threats, can evolve in a decentralized fashion, and need not be imposed by third parties such as courts. The history of Britain supports this

considered a part of the mainstream opposition; Justice Marshall, however, who derailed the trial by defining “treason” narrowly, was. But see Robert K. Faulkner, *Justice Marshall and the Burr Trial*, 53 *J. Legal History* 247 (1966) (criticizing the view that Marshall’s interpretation of treason law showed political bias).

⁶⁸ See Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* 278-79 (1971).

⁶⁹ See, e.g., Avrigh, *supra*, at 280-85 (anarchists); Belknap, *supra*, at 113 (communists). However, it is important to note that these trials created a political backlash. Several of the Haymarket defendants were ultimately pardoned, and the trial radicalized many workers. Avrigh, *supra*, at 307-12 (after trial), 409-14 (after executions), 433-36 (long term effect).

⁷⁰ During the U.S. Civil War a large number of Northerners suspected of Southern sympathies were detained by the military, with no judicial process. The precise number is unknown, but it was probably in the hundreds (if one limits oneself to the clearest cases) or thousands (especially, if one includes draft resisters, unexplained arrests, and so forth). See Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 51-65, 113-38 (1991) (describing arrests and detentions). Detainees did receive military hearings, which involved regular procedures. *Id.*, at 162-75.

⁷¹ Harold Josephson, *Political Justice During the Red Scare: The Trial of Benjamin Gitlow*, in Belknap, *supra*, at 181.

⁷² See James W. Ely, Jr., *The Chicago Conspiracy Case*, in *American Political Trials*, *supra*, at 249-50.

proposition, as does self-restraint in the use of the impeachment power in the United States,⁷³ and for that matter the self-restraint of executive branch officials even when there has been short-term public support for political trials. However, in the United States the judiciary has a great deal of prestige, and it can interfere with political trials that the government is inclined to pursue. Thus, it is useful today to take the perspective of the judge, and ask how a judge should manage a criminal trial that is, or might be, motivated by the political goals of the government.

III. Design Principles

A political trial trades off two values: the value of convicting a defendant who poses a risk to the government or public and the value of maintaining the public's confidence that the government does not target political opponents. Ordinary judicial process, involving relatively specific laws that prohibit harmful behavior, reflects the weight of the second value. The question raised by the political trial is whether process should be relaxed (or enhanced), and in what ways. This question is one of design and management.

A. Laws Against Political Opposition

The most easily recognizable political trial is an ordinary trial for violation of a law that prohibits political opposition to the government. Authoritarian states have often enacted such laws. The law might prohibit the formation of political parties aside from the ruling party; any kind of political activity that opposes the government; subversive activity; advocacy of policies that are contrary to government policies; and so forth. A trial in which all the forms of legality are respected would nonetheless result in the conviction of a defendant because of his political views or activities.

Liberal democracies do not have laws prohibiting mainstream political opposition: tolerance of formal political opposition is the key distinction between the liberal democratic system and the authoritarian system. But the amount of tolerance is not absolute. Turkey—whose democratic credentials are solid but not perfect—bans fundamentalist Islamic parties. Germany prohibits parties that oppose its constitutional

⁷³ See Hoffer and Hull, *supra* (discussing early state and federal impeachments in the United States).

system.⁷⁴ Other democracies have similar bans on extremist parties and subversive activities that are counter to the constitutional order.⁷⁵ Thus, they make a distinction between mainstream political dissent, which is tolerated, and constitutional dissent, which is not tolerated.

In the United States, there have been four overt attempts to suppress political dissent. The Sedition Act of 1798 prohibited “false, scandalous and malicious” statements about the government, but it was interpreted broadly so that it could be used to prosecute mainstream Republican opponents of the Adams administration. That statute expired in 1801. Martial law during the Civil War permitted the military to try and punish people who criticized the Lincoln administration’s conduct of the war.⁷⁶ The Espionage and Sedition Acts of 1917-1918 were directed against obstruction of recruitment and interference with the military, but it was broadly interpreted to prohibit criticism of American participation in World War I. The Smith Act of 1940 prohibited advocacy of violent revolution of the government, and was also interpreted broadly until 1957.⁷⁷ The Internal Security Act of 1950 and the Communist Control Act of 1954 “effectively criminalized the Communist party.”⁷⁸ Of these cases, only the Sedition Act of 1798 was, as interpreted by judges, a clear effort to suppress dissent by a mainstream group. The Espionage and Sedition Acts and the Smith Act targeted extremists, although these extremists did include prominent people (such as Eugene Debs) who had large followings. The Civil War case is ambiguous.

Why would a government prosecute members of fringe parties or people with idiosyncratic political beliefs? By assumption, these people do not pose a threat, or much of a threat, to the political dominance of the government. One reason is that such people may be dangerous to the public. The U.S. government prosecuted Communists not because they posed an electoral threat, but because they were loyal to America’s enemy,

⁷⁴ See Finn, *Electoral Regimes*, supra, at 56 (quoting, article 21(2) of the German Constitution: “Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional...”).

⁷⁵ *Id.*, at 70-74 (describing laws of Chile, Estonia, France, Germany, Ireland, Israel, Italy, Portugal, Romania, and Rwanda).

⁷⁶ See Randall, supra, at 177-85.

⁷⁷ See *Yates v. United States*, 354 U.S. 298, 338 (1957).

⁷⁸ Finn, *Electoral Regimes*, supra, at 60.

the Soviet Union.⁷⁹ The U.S. government currently pursues al Qaeda sympathizers because an al Qaeda sympathizer might provide money, shelter, or other support to actual terrorists. If the evidence of criminal behavior is not strong, the government moves against these people based on an assessment of the risks. A Communist ideologue might be a spy, or know a spy.⁸⁰ An al Qaeda sympathizer—especially one with a great deal of wealth and ties to fundamentalist Islamic groups—is a risk even if he has not committed a crime, or cannot be proven, given the standards of criminal law, to have committed a crime. Such a sympathizer may also demoralize the public by cheering on terrorist attacks, and create an atmosphere of insecurity. Thus, people with extreme antigovernment beliefs are more likely to be public threats than people without such beliefs—even ordinary criminals—and for this reason governments may seek to prosecute them.

To prosecute such people without violating due process, the government would need to rely on laws that directly prohibited such activity. As we have seen, there are, and have been, many such laws—against subversion, conspiracy to violate the law, and the like—but these laws have proven to be unpopular. The problem with criminalizing membership in a particular organization like the American Communist Party is that members can easily evade the law by disbanding the proscribed organization and setting up a new one. If broader laws are used, and all seditious organizations or activities are prohibited, then mainstream organizations can too easily be swept within their net, a possibility that inevitably provokes widespread political opposition—and understandably, as the government may find itself unable to resist the temptation to enforce the laws against mainstream political opponents.⁸¹

If a government cannot enact laws against political opposition, then it will find itself hampered in its efforts to prosecute public threats who have not engaged in clearly illegal or violent acts. Its best hope is to bring charges under a general law against

⁷⁹ Stone, *supra*, at 410.

⁸⁰ The Soviets preferred agents with an ideological motivation because they were more reliable than paid agents. See Weinstein, *supra*, at 29.

⁸¹ This is one of the distinctive problems in the current pursuit of terrorists. See William J. Stuntz, *Local Policing After the Terror*, 111 *Yale L.J.* 2137 (2002).

disorderly or subversive behavior,⁸² or even unrelated laws against, say, wire fraud or extortion,⁸³ and then persuade the judge to acquiesce in restrictions on process. These restrictions are the hallmark of political trials in liberal democracies and the focus of the next several sections.

B. Charges, Defense, and Evidence

Legalism requires that defendants be charged with the violation of an existing law; that defendants be informed of the charges against them, so that they may prepare a defense; and that defendants be given access to evidence, so that they may prove their case.

All of these elements of normal process interfere with the prosecution of public threats. If the government does not have laws against political or ideological opposition, then it will not be able to apply generally applicable rules against criminal behavior to people who have not yet caused a harm or who are not on the verge of doing so. If the government must candidly inform the defendant that it has no legal case against him, then he will be able to make a plausible argument that the trial is political. And the government may not be able to reveal evidence that the defendant is a public threat without compromising intelligence assets and revealing information that will harm security. In the Rosenberg case, for example, some of the government's evidence came from secret cable intercepts that, if revealed, would have permitted the Soviet Union to destroy valuable intelligence assets.⁸⁴ The problem for the government is that if it denies

⁸² General laws against disorderly and similar behavior that could sweep in political activity are politically acceptable for familiar reasons: laws that are prospective and general cannot be easily used against political opponents as they might sweep in political supporters as well. See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *Yale L.J.* 399, 408-15 (2001).

⁸³ That many federal (as well as state) laws are so broad and vague that they can be used to criminalize almost any tort or even breach of contract has been noted by many scholars; e.g., John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 *BU L. Rev.* 193, 202-13 (1991) (discussing wire fraud and the Hobbs Act). The effect of these laws is to give prosecutors a great deal of discretion; see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Decision*, 46 *UCLA L. Rev.* 757 (1999) (discussing institutional mechanisms for limiting prosecutorial discretion); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505 (2001) (discussing the reasons why various political actors and interest groups prefer broad criminal laws).

⁸⁴ Ronald Radosh and Joyce Milton, *The Rosenberg File xv-xxii* (2d ed. 1997) (discussing the Venona project).

process—say, it tries the defendant in secret in order to determine whether he is a public threat or not—then it risks losing its credibility.

The government reduces these tensions in several ways.

Selective prosecution. First, the government prosecutes public threats, when possible, for violating generally applicable laws—laws against conspiracy, disorderly conduct, subversion, trespass, incitement to riot, and so forth—that are not usually enforced against ordinary people who do the things that the actual defendant did. This approach is very much a compromise. On the one hand, the public will be suspicious of the government because selective prosecution can be used against political opponents. On the other hand, the harm to the government’s reputation is mitigated by the fact that the generally applicable laws have received public approval, and political opponents can maintain their freedom by complying with these laws. There may be a special hardship in complying with nanny taxes, sodomy laws, and conspiracy laws that no one else pays attention to, but that is not as bad as prosecution that is unconstrained by the law. In addition, general laws often have lower sentences, precisely because they can be applied against so many people; so the corresponding risk to political opposition is lessened.

Consider the following examples. Discussing the trial of Leroi Jones in 1967, one scholar notes that “it was uncertain whether Jones was on trial for a stated or implied charge—for having possessed [two revolvers], or for having been responsible, in some mysterious way, for the riots that had engulfed Newark.”⁸⁵ The Chicago 8 were tried for conspiracy to incite riots but the real motivation was to suppress the defendants’ vigorous and effective opposition to government policy and to make an example of them. The East German head of intelligence—to take an example from a transitional trial—was tried for a murder he committed sixty years earlier; his real crime was his leadership of East German intelligence.⁸⁶ At Nuremberg, the prosecutors hit upon the fiction of the criminality of certain Nazi organizations such as the SS, so that all members including (in

⁸⁵ Kenneth M. Dolbeare and Joel B. Grossman, *LeRoi Jones in Newark: A Political Trial?*, in *Political Trials*, supra, at 227-32.

⁸⁶ Posner and Vermeule, *Transitional Justice*, supra, at 817.

principle) janitors and secretaries, could be held guilty for the crimes directed by the leaders of the organization.⁸⁷

An extreme example comes from the Haymarket trial. The defendants had advocated violent revolution, but no evidence linked them to the bomb-thrower (never caught) who killed the police officers. The judge instructed the jury that the defendants could be convicted if they “by print or speech advised, or encouraged the commission of murder, without designating time, place or occasion at which it should be done....”⁸⁸ The government sought to disrupt the anarchist movement, and the murder became the occasion for eliminating several of its leaders, and of frightening its members.

Governments can rarely be completely candid in political trials because they do not want to admit that the trial violates due process even if the violation is justified for reasons of public security. Instead, governments accuse the defendant of violating a general law, while also arguing that the acute danger posed by the defendant justifies a harsh sentence. Defendants might complain that if they do not know the real reason that the government is prosecuting them, they cannot mount an effective defense. LeRoi Jones could argue that he cannot defend himself if he thinks the government is prosecuting him for gun possession when in fact the judge and jury will convict him if they think he caused the Newark riots. I will say more about this concern below.

Partial sharing of evidence. Second, the government may be willing to reveal classified evidence to the judge or the defense lawyer as long as it is not shared with the defendant. The defendant can legitimately object that he will not be able to mount a sufficient defense without having access to the information; he may not be able to reveal relevant mitigating evidence to his lawyer or the judge unless he knows about the apparently inculpatory evidence that is classified.

⁸⁷ There are other, harder examples. The Nuremberg tribunal said that the Germans engaged in “aggressive war” in violation of the Kellogg-Briand pact, but it is highly doubtful that this pact created any international legal obligations, that the Germans violated them if it did, and that German individuals would be liable if the German state did violate any international legal obligations under that pact.

⁸⁸ Avrich, *supra*, at 277.

There are various intermediate strategies. In some current prosecutions of Islamic terrorists, for example, the government shares the evidence with defense lawyers on the condition that they do not reveal it to the defendant.

The upshot is that the government gains the power to use classified evidence but also incites the distrust of the public, who might believe that the evidence is not inculpatory and the defendant is merely a political opponent. The solution is to shift the burden to the judge (and/or defense lawyer) in the hope that the public will believe that the judge will evaluate the evidence impartially and can evaluate it correctly without hearing the response of the defendant. The solution can be effective—in the sense of maintaining the government’s credibility while allowing it to convict the defendant—only if the public believes that the judge is impartial and the defendant’s inability to respond to the evidence does not undermine his ability to defend himself. But then the question is, why should the public trust the judge? We return to this question in Part III.C.

Political defenses. Third, the court, with or without the government’s acquiescence, may allow the defendant to mount a political defense. Ordinary criminal defendants are rarely permitted to argue that their crimes were justified because the government is evil. There is no reason for an ordinary criminal trial to become a forum for evaluating the government’s policies. But when the public suspects that the defendant is being prosecuted for his political views, it may make sense to allow the defendant to mount a political defense. If his views are extreme—for example, he is an anarchist who thinks that terrorism is justified—then the public will be more likely to support the prosecution. If his views are moderate, then it will be more likely that the government’s motives are partisan. Thus, by allowing defendants to make political statements, governments may be able to show that a prosecution is appropriately directed toward a public threat rather than motivated by partisanship.

The judge in the Debs case permitted the defendant to make a speech defending his actions—opposition to American participation in World War I—on political

grounds.⁸⁹ The judge in the Dennis case prevented the defendants from arguing that the Communist Party had an appealing political program and limited them to the question whether the party had ever advocated violent revolution.⁹⁰ Both trials were successes for the government and the judge, though the Debs trial was far less disruptive even though he was a more politically popular figure.

The problem with allowing defendants to mount a political defense is that they may persuade the public to take their side; and, even if they do not, they may be able to undermine the public's confidence in the justice system by converting the trial into theater, preferably farce. Mockery of the judge, disruption, grandstanding, and delay become the defendant's most powerful tools. Disruption provokes the judge to take harsh measures against the defendants which further show that the judge is complicit in the government's effort to suppress political dissent.

This strategy succeeded spectacularly in the trial of Elizabeth Dilling and her codefendants—a group of Nazi sympathizers prosecuted under the Smith Act during World War II—whose lawyers objected to every act of the prosecutor and disputed every ruling of the judge. The trial dragged on for months and then ended abruptly with the death of the trial judge—from exhaustion, it is said. A retrial more than a year later was dismissed.⁹¹

To deal with these problems, judges need great skill and patience. The judges in the trial of Edward Dennis and other members of the American communist party in 1949, and in the trial of the Chicago 8 in 1969, were considerably less tolerant of courtroom theatrics than the Dilling judge was. The Dennis judge frequently cut off the defendants and their lawyers. The Chicago 8 judge jailed defendants and their lawyers for contempt. In taking these steps, the judges opened themselves up to the accusation that they were depriving the defendants of a fair trial. Numerous rulings of the Chicago 8 judge were reversed on appeal. Although both judges survived the ordeal,⁹² the Dennis judge was far more successful; and the reason was almost surely that Dennis was a less sympathetic

⁸⁹ Peterson, *supra*, at 252-54.

⁹⁰ Steinberg, *supra*, at 161.

⁹¹ Belknap, *supra*, at 196.

⁹² For the Dennis trial, see Belknap, *supra*, at 77-116; Steinberg, *supra*, at 157-77; for the Chicago 8 trial, see Danelski, *supra*, at 178-80.

figure at the time, than the Chicago 8 defendants were. America was unified in its opposition to the Soviet Union, and therefore Dennis was unpopular except among fringe groups; America was divided over Vietnam, and thus the Chicago 8 defendants, although politically extreme, enjoyed some mainstream support for their stand against American militarism.

In international criminal trials, these tensions are even more acute. The Nuremberg charter prohibited defendants from making the “tu quoque” defense that their behavior was no different from that of their enemies. As a result, it was no defense for the Nazis that their crimes of aggressive war were matched by those of the Soviet Union, which invaded Poland, the Baltic states, and Finland.⁹³ These prohibitions were only partially successful. As always, they raised the specter of victor’s justice, and in any event did not prevent many Nuremberg defendants from drawing the world’s attention to the misdeeds of the allies.⁹⁴

To prevent them from doing so, the American prosecutor, Robert Jackson, had requested that defendants under cross-examination be limited to yes/no answers. The judges refused, and as a result Goering was able to best Jackson in the cross-examination, humiliating Jackson and providing a tonic for the defense. Tusa and Tusa argue that nonetheless “those [defense lawyers] who wanted to continue to complain about the unfairness of the proceedings now did so with less chance of winning sympathy.”⁹⁵ One might instead say that the prosecutors’ arguments would more likely persuade the world if the defendants had an adequate chance to refute them and failed, than if the defendants did not have the chance to refute them. Jackson’s request betrayed the fear that the world would not be persuaded if the defendants had the opportunity to explain themselves during cross-examination, in which case muzzling them might have been the right strategy, albeit at the risk of creating a show trial.

The Yugoslavia tribunal has had even more trouble with political defenses. Milosevic and other defendants have used the trials to rally support for their causes at home, and to cast aspersions on the motives of the judges and the international

⁹³ See Marrus, *supra*, at 131-32.

⁹⁴ Marrus, *supra*, at 116-17.

⁹⁵ Tusa and Tusa, *supra*, at 291-92.

community, which they accuse of exhibiting bias against Serbia. Milosevic's trial may take as long as five years.⁹⁶ The trials have been blamed for a resurgence of nationalism in Serbia after a period of optimism that Serbia would become a normal liberal democracy or a reasonable approximation of one.⁹⁷

Judges can interrupt defendants who do not follow the rules, and hold defenses out of order, but the defendants can complain of this, and so jurors and other witnesses might conclude that the government's motives are partisan, the judge is complicit, and the defendants are political opponents rather than public threats. Thus, like the other devices we have discussed, limiting the defense can have ambiguous effects. It can increase the probability of convicting a public threat by depriving the defendant of a defense, but it can also cause the jury to acquit the defendant, or the public to withdraw support from the government, because they suspect that the defendant is merely a political opponent.

C. The Judge

Judges are supposed to be impartial: they enforce the rules without bias toward the prosecution or the defense. For ordinary criminal trials, the ideal of the impartial judge is attainable because judges, whatever their hostility toward criminals, can enforce the rules of due process and ensure that people likely to have committed crimes are locked up in jail. Generally applicable criminal laws are uncontroversial; the judges can enforce those laws; and the ordinary rules of process function mainly to ensure that innocent people are not inadvertently convicted.

Normal process no longer functions smoothly when the defendant is a public threat who has not committed any crime. If no law against political dissent or opposition exists, then the judge can ensure conviction of the public threat only by relaxing the rule of law. In this way, the judge must be complicit in the government's effort to selectively apply

⁹⁶ See Judith Armatta, *Milosevic Trial Faces Long Haul*, Institute for War and Peace Reporting, February 28, 2003.

⁹⁷ See *Serbia Votes to Pay Milosevic During His War Crimes Trial*, The New York Times, March 31, 2005, at A6; Nicholas Wood, *Fed by Anger, Undercurrent of Nationalism Flows in Serbia*, The New York Times, February 15, 2004, at 15; Nicholas Wood, *Milosevic's Name on the Ballot Signals Serbian Nationalism*, December 27, 2003, at A2.

vague, general laws against particular defendants, or even in the trumping up of charges when no such laws can be used.

This leads to our familiar dilemma. If judges relax process when they think that a defendant is a public threat, then governments may take advantage of this opportunity and bring charges against partisan opponents. Eventually, the public, including the mainstream opposition, will realize that process protections have been relaxed, and the government will lose its credibility. If people believe that the government targets its political opponents by persuading judges that they are public threats, they will—on the theory I have advanced—withdraw their support from the government. They would likely withdraw their trust from the judiciary as well.

Several design features of the judiciary mitigate this tension. I divide them into two categories: selection of judges and incentives of judges

Selection of judges. In the United States, virtually every judge is a member of one of the two major political parties, and is selected on the basis of two criteria: competence and proved partisan loyalty. In most other advanced countries, judges are members of the government bureaucracy but are trained as, and treated as, experts rather than partisans.

The American system functions properly as long as the parties alternate in power and/or government is occasionally divided, so that judicial appointments are, individually or in the aggregate, the product of compromise between the two parties.⁹⁸ As most judges are the product of the patronage system, they will refuse to allow the other party in power to convict members of their own party on trumped up charges. To be sure, frequently a (say) Republican government will be able to bring a case before a Republican judge, but then there is the chance that the appellate panel will be dominated by Democrats, who will be sure to draw attention to partisan elements in the trial if there are any. By contrast, neither a Republican judge nor a Democratic judge will have much sympathy for a

⁹⁸ Cf. J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. Legal Stud.* 721 (1994); Matthew C. Stephenson, “When the Devil Turns ...”: *The Political Foundations of Independent Judicial Review*, 32 *J. Legal Stud.* 59 (2003) (arguing that roughly equally matched parties in a competitive party system will tolerate an independent judiciary so that they are protected from persecution when out of power).

radical who seeks to destroy the constitutional system under which the judges exercise power. Thus, they are more likely to relax the rules of process in such cases.

The selection system in foreign countries is not quite as effective. Judges are trained as technocrats, and therefore they are more likely than their American counterparts to apply process rules in a mechanical fashion, regardless of the political views of the defendant. This may explain why legislatures in some of these countries—especially, Germany—are more likely to pass laws that prohibit extreme political dissent inconsistent with the constitutional underpinnings of the state.

Incentives of judges. But the civil law systems make up for the weak selection mechanism with more powerful incentives. Judges are bureaucrats, and while they have some civil service protections, they are vulnerable to sanctions meted out by the government. In Japan, for example, judges who displease the government may find them assigned to remote, rural districts.⁹⁹ To avoid such sanctions, judges may be willing to relax process rules when the defendant is a public threat.

But then why wouldn't such judges also permit convictions of partisan opponents? The answer is likely that the judges must fear that the mainstream opposition party of today will be the party in power tomorrow, and then armed with the power to exile the judge to remote districts or show their displeasure in other ways. Thus, the alternation of parties maintains an incentive to enable the prosecution of people whom both parties dislike—genuine public threats—and not the prosecution of people whom only one party dislikes, namely, members of another mainstream party.

By contrast, it is harder for the American government to punish judges who fail to relax process in trials of public threats. Federal judges have independence under the constitution, which, as a practical matter, makes punishment impossible. Still, the government can reward compliant judges by elevating them. Indeed, the judges in the

⁹⁹ See Ramseyer, *supra*, at 727-28. (“judges who decided politically sensitive cases according to non-LDP political preferences incurred a substantial risk that the Secretariat would assign them to a series of low-status positions.”)

Rosenberg and Dennis cases were elevated to the court of appeals.¹⁰⁰ Judge Hand, who ruled against the government in an espionage act case during World War I, was subsequently denied elevation to the courts of appeals that may have been his due.¹⁰¹

As a practical matter, then, the American and foreign systems have the same effect. They either select judges, or give them incentives, such that process rules are likely to be maintained for trials of mainstream partisan political opponents, but not for trials of public threats or people with fringe views. Judges might expect to be rewarded when they conduct trials that lead to convictions of people who are widely regarded as public threats—either with popular acclaim or elevation or similar benefits. In the first week after the Dennis case concluded, the presiding judge received 50,000 letters from grateful citizens, who urged him to run for office.¹⁰² And, of course, judges may share the public’s fear of public threats, and be willing to relax process rules in order to convict them.

How judges relax process. How do judges relax process without destroying the rule of law as a device for maintaining political peace between mainstream groups? The key has been to relax process only for extremists, and only during times of emergency.

As to the first point, there are only two historical episodes in American history when mainstream political opponents were prosecuted. The first episode involved the prosecutions under the Sedition Act of Jeffersonian opponents of the Federalists. These prosecutions were extremely unpopular, and contributed to the massive electoral defeat of the Federalists in 1800, and their elimination as a viable political party.¹⁰³ Consistent with my thesis, the Federalists only made themselves more unpopular—less trustworthy for most voters—by prosecuting their political opponents.

The second episode was the Civil War, when military rule enabled authorities in the North to prosecute people who expressed political sympathy with the Confederacy.

¹⁰⁰ Irving Kaufman, who presided over the Rosenberg case, and Harold Medina, who presided over the Dennis case, were both elevated to the Second Circuit Court of Appeals. Both judges were highly regarded before these cases, so it is quite possible that they would have been elevated anyway.

¹⁰¹ See Stone, *supra*, at 168-70. His elevation was delayed several years. Other judges who acted similarly were attacked in the press and ostracized. *Id.*

¹⁰² Belknap, *supra*, at 113.

¹⁰³ See Smith, *supra*.

These trials sometimes led to significant political disturbances in the North, and Lincoln, who was more politically sophisticated than the generals to whom he had to delegate military rule, was not happy with them.¹⁰⁴ However, to avoid the obstructionist efforts of mainstream judges like Justice Taney,¹⁰⁵ Lincoln had to rely on military rule, and with it the attendant risks.

Since then, there have been no American political trials against mainstream political opponents. All political trials have targeted extremists—Communists and anarchists, Nazis, KKK members, members of Islamic fundamentalist groups. When the government prosecutes extremists, we are not as likely to assume that it is trying to obtain partisan advantage—these extremists are just too weak and unpopular, and are feared because of their tendency toward violence—except, of course, when the prosecution takes advantage of public fears or misunderstandings for political gain (no different from ordinary prosecutions for political gain).

This is not to say that trials of extremists have been uncontroversial. Political views fall along the spectrum, and trials against extremists make people nervous who are between the extreme and the mainstream. But the point, for now, is that American judges have allowed these trials to proceed, and they have been politically possible and even advantageous.

Indeed, some judges have enthusiastically facilitated political prosecutions. The Federalist judges in the Sedition Act cases instructed juries in such a way that shifted much of the burden of proof onto the defendants.¹⁰⁶ Most judges in Espionage Act cases during World War I read the statute broadly, so that the government would not need to provide evidence that the defendant's statement caused a direct harm such as obstruction of military recruitment.¹⁰⁷ The judge in the Haymarket case allowed the bailiff to stack the jury with middle class, mostly native born citizens hostile to the anarchist, working-class, foreign born defendants; and gave the prosecution much more latitude than the

¹⁰⁴ See Randall, *supra*, at 179 & n. *.

¹⁰⁵ As shown in *Ex parte Merryman*, 17 F. Cas. 144 (1861); see also *Ex parte Milligan*, 71 U.S. 2 (1866).

¹⁰⁶ See, e.g., *Smith, Freedom's Fetters*, *supra*, at 326-27 (instructions for Thomas Cooper's trial).

¹⁰⁷ Peterson, *supra*, at 17.

defense.¹⁰⁸ The judge in the Chicago 8 case jailed many of the defendants and their lawyers for contempt, errors that were reversed on appeal.¹⁰⁹ The judge in the LeRoi Jones case made clear, by his questioning and demeanor, that he believed that Jones was guilty.¹¹⁰

An abiding concern for judges is that if they identify too closely with the government, they will lose their reputation for impartiality. If they are not considered impartial, or at least as some sort of constraint on the government, they will both lose much of their public support and also the support of the government itself, which can benefit from judges who constrain it somewhat, rather than too much or too little. Judges preserve their integrity while allowing governments leeway in two main ways.

First, judges relax process mainly during wartime and other emergencies.¹¹¹ In doing so, they ensure that normal political competition will occur during normal times, at which time judges will enforce normal process protections. This is not altogether satisfactory, however, because the government can use emergencies, or pretextual emergencies, as opportunities to consolidate power. In addition, if judges are seen as toadies of the government during an emergency, they may not be able to shake off this reputation during normal times.

Second, judges encourage governments to create specialized courts that are not operated by regular (Article III) judges. Military courts and commissions are examples; notice that these tribunals do not eschew process altogether but reduce it. Military judges and lawyers are loyal to the military, but are expected to act with some independence and can be trusted to keep secrets.¹¹² Allowing the government to use the military does not protect partisan opponents, but it does preserve the integrity of the judiciary (except to the extent that permitting military trials undermines it), so that it can credibly reassert its impartiality as between the mainstream parties when the emergency ends.

¹⁰⁸ See Avrich, *supra* at 262-67.

¹⁰⁹ *Id.*, at 78.

¹¹⁰ See Dolbeare and Grossman, *supra*, at 232-34.

¹¹¹ Eric A. Posner and Adrian Vermeule, *Accommodating Emergencies*, 56 *Stan. L. Rev.* 605 (2003).

¹¹² For the Supreme Court's views of the tradeoffs involved, see *Johnson v. Eisentrager*, 339 U.S. 763, 778-79 (1950) (upholding conviction by military tribunal of nonresident enemy aliens).

We have seen these two factors at work in the Bush administration's creation of military commissions to try al Qaeda members and Taliban soldiers. The establishment of these commissions has not hurt the government politically¹¹³ because the public appears to believe that emergency conditions justify a relaxation of due process and, at the present time, it is not plausible to think that these commissions are being used against mainstream partisan opponents.

D. The Jury

Scholars today usually think of juries as fact-gathering institutions. Because jurors bring diverse experiences and expectations to the trial, they can combine their perspectives, enabling them to sift evidence more effectively than even a highly experienced judge. The assumption that juries are necessary for accuracy has stimulated a large literature that investigates the extent to which jurors really do make correct decisions about guilt and innocence. Although this literature has not come to firm conclusions, evidence suggests that cognitive biases and social influences may cause jurors to make worse decisions than judges do.¹¹⁴

This scholarly focus has obscured another function of juries, which is not so much to contribute to the accuracy of the fact gathering process as to present a barrier against government oppression with judicial connivance. The jury's entrenchment in American jurisprudence is due to its success prior to the revolution, when jury nullification derailed prosecutions of revolutionaries and other critics of the British government. The judges, who owed their position to British authorities, took the side of the prosecution, and were frustrated by the recalcitrant juries. This history implanted in the American mind the conviction that juries, not judges, are the bulwark against political prosecutions.¹¹⁵

The history suggests that the jury could be an ideal device for permitting political prosecutions against public threats but not against partisan opponents. After the American revolution, the jury could no longer regard the government as presumptively a hostile force. And if the government can make a plausible case that a particular defendant poses

¹¹³ Democratic candidate John Kerry did not make an issue of them during the presidential election campaign.

¹¹⁴ See, e.g., Cass R. Sunstein et al., *Punitive Damages : How Juries Decide* (2003).

¹¹⁵ See Amar, *supra*, at 1149.

a public threat, the jury may be willing to convict even though the legal basis of the conviction is weak. In addition, as long as the jury is politically diverse—in the sense of having at least one or two members who belong to, or sympathize with, the opposition party—the unanimity rule ensures that partisan convictions will not be possible. To be sure, extremists who find their ways onto juries may be able to block the conviction of a public threat, but judges and lawyers are careful to prevent such people from being assigned to the jury. Thus, as a general matter, juries ought to be able to hinder partisan prosecutions but not prosecutions of public threats.

American history provides only ambiguous evidence for this hypothesis. Juries have tended to return convictions, whether the defendant belonged to an extremist or mainstream group. Thus, although it is true that Wobblies, members of the Communist Party, and foreign spies have been routinely convicted,¹¹⁶ juries also returned convictions almost without exception under the Sedition Act of 1798, which targeted mainstream opponents of the government.¹¹⁷ Juries did not interfere with Sedition Act prosecutions because jurors were selected by political appointees such as marshals,¹¹⁸ and many of the judges, at that time, instructed the juries in an aggressive fashion. However, jury manipulation became a political issue that was exploited by the Republicans.¹¹⁹ And perhaps the fear of jury nullification explains why there were not more trials in the Republican dominated south.¹²⁰

The best evidence for the hypothesis that juries could block political convictions comes from the indirect case of the Civil War. We cannot directly prove this argument because highly charged political prosecutions did not occur in front of juries. With the suspension of habeas corpus and military rule, political opponents could be tried without a jury or, for that matter, an independent judge. But it seems clear that the reason that Lincoln and then Congress suspended habeas corpus was that they expected juries to

¹¹⁶ But not always; trials of some prominent radicals during World War I under the Espionage Act resulted in a hung jury. See Stone, *supra*, at 170 & n. *. Some Vietnam era trials also ended in acquittals or hung juries. *Id.*, at 483.

¹¹⁷ See James Morton Smith, *Freedom's Fetters*, passim (1956); for one exception, see *id.*, at 282.

¹¹⁸ See *id.* at 422-23; and see, e.g., *id.* at 235-36 (trial of Lyon), *id.* at 321 (trial of Cooper), *id.* at 348 (trial of Callender)

¹¹⁹ See, e.g., Smith, *supra*, at 321, 348.

¹²⁰ *Id.*, at 187. The preponderance of trials in northern and middle states was due to the greater influence of Federalists in those areas. *Id.*, at 177.

acquit Southern sympathizers and others who were conspiring to impede troop movements or engage in sabotage but who had not committed a provable crime.¹²¹

Thus, although juries have not in practice interfered with many political trials, the costs and visibility of manipulating them in order to ensure that a conviction will be obtained may prove to be too high for many governments. The more mainstream the political opponent, the more difficult it will be to manipulate the jury—because it is more likely that a member of the opponent’s party will end up on the jury unless manipulation takes place. And even if manipulation is successful, it may be blatant and thus good fodder for the defense. It might be that there have been fewer partisan trials than there would have been if there had been no jury right.

E. The Defense Lawyer

Good legal process grants criminal defendants the right to competent and independent defense counsel. Competence is a straightforward requirement; independence is more complex. Defense lawyers are officers of the court, and they are not permitted to help the defendant engage in perjury. But, even if paid by the government, they are, as a matter of custom, law, and professional self-understanding, antagonistic to the prosecution, to the point that obtaining an acquittal of a guilty client may seem a positive duty and a badge of honor. And, of course, defense lawyers attract clients by obtaining acquittals.

When the defendant is a public threat, the independence of the defense counsel may create problems. At one extreme, defense lawyers may belong to groups that share the terroristic goals of the defendant. If so, revealing classified information to defense lawyers becomes an unacceptable risk for the government. Even allowing defense lawyers to have private contact with defendants may pose unacceptable risks, as defense lawyers may carry messages between defendants and their organizations.¹²² Even if the defense lawyer does not share the defendant’s goals, he or she may inadvertently reveal sensitive information.

¹²¹ Farber, *supra*.

¹²² See Julia Preston, *Lawyer Is Guilty of Aiding Terror*, *The New York Times*, February 11, 2005, at A1 (lawyer for al Qaeda member convicted of providing material aid to a terrorist).

At the other extreme, the defense lawyer's good faith zeal on behalf of his client may hinder the prosecution of a public threat. Defense lawyers demand process; if the government relaxes process, the defense lawyer will draw attention to the government's efforts, and cause public embarrassment, and perhaps persuade the jury to acquit. All of this may be tolerable but far from ideal.

But denying the defendant a lawyer is hardly a solution, as it encourages the public to think that the government believe that the defendant is being tried because he is a partisan opponent rather than a criminal or a public threat.

Various intermediate mechanisms have been developed. First, the weakest constraint is to require defense lawyers to abjure any connection with, or sympathy for, extremist groups. In the United States, this constraint arose in a decentralized way when bar associations decided that their members may not belong to the Communist party.¹²³

Second, governments may replace civilian defense lawyers with military lawyers. This requires a suspension of habeas corpus, as in the Civil War, or else the classification of the defendant as an enemy combatant.¹²⁴ Military procedure does not usually do without lawyers; but the defense lawyers are soldiers, and therefore can be assumed to be more loyal to the state than ordinary defense lawyers are.

Third, governments can give more or less assistance to lawyers; more or less access to their clients; and so forth. In some of the recent enemy combatant cases, the defendants were initially denied access to a lawyer, and then given limited access under supervision. At Nuremberg the defense lawyers were drawn from the German bar but had little time to prepare their cases, compared to the prosecution, which had a head start in addition to its vast resources.¹²⁵ The defendants at the Tokyo trial were given American and British lawyers to assist them, allowing them to mount a more effective defense.¹²⁶ The problem here, however, was that the American and British lawyers did not

¹²³ See Kirchheimer, *supra*, at 253-54, citing *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957). See also *Sacher v. United States*, 343 U.S. 1 (1951).

¹²⁴ It remains unclear whether defendants must be given civilian lawyers; see Hamdi, *supra*.

¹²⁵ *Id.*

¹²⁶ See B.V.A. Roling, Introduction, in *The Tokyo War Crimes Trial: An International Symposium* 15, 19-20 (C. Hosoya et al. eds. 1986).

understand their clients very well, and were not sympathetic to their main goal, which was to protect the Emperor rather than gain acquittal.¹²⁷

To the extent that defense lawyers feel loyalty to the government, or have internalized norms of judicial process—so that they will attack the prosecutor but not the system—they may have limited value for the political defendant. The American Communist Party instructed its members not to use lawyers, or to limit them to the technical aspects of the case, and trained members to use the courtroom as a platform for espousing their opposition to capitalism. The goal was not to persuade the jury to acquit the defendant—though that would be welcome—but to persuade workers that the capitalist justice system could not do justice.¹²⁸

F. Publicity

Political trials are often public but not always. Publicity serves the cause of the government when it believes that the defendant is a public threat, and that the public, persuaded by the prosecution that the defendant is dangerous, will forgive any bending of the rule of law and feel gratitude to the government for protecting it.

But publicity also protects the defendant, who can use the trial as a platform to denounce the government. The Chicago 8 trial is the best example of this phenomenon in recent memory, but there have been many other trials in which the government backed off and dropped charges or settled after the political danger of the trial became clear; or pardoned or granted clemency to the defendants. Eugene Debs' stature rose after his conviction for sedition during World War I. He received almost one million votes for president while in jail, and subsequently his sentence was commuted by President Warren Harding.¹²⁹

If publicity can protect the political opponent, it can also endanger the prosecution of the public threat. Many political trials have been against accused spies such as the Rosenbergs and Alger Hiss, and the government does not want to reveal secret

¹²⁷ Id.

¹²⁸ Belknap, *supra*, at 13-17 (discussing the activities of the International Labor Defense).

¹²⁹ Christianson, *Political Trials in History*, *supra*, at 97-98. Harding also pardoned Abrams and his codefendants, but this was part of a bargain in return for which the defendants exiled themselves from the United States. Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* 336-38 (1987).

information to the world. The usual practice is to keep relatively low level trials secret when that is permitted by law; military tribunals may be kept secret, for example. But this creates the risk that the public will infer that the defendants are not public threats but political rivals of the government.

Political trials are often farcical, and, for many, this shows that they are a bad idea. At the Chicago 8 trial, the defendants Abbie Hoffman and Jerry Rubin appeared in court one day wearing judicial robes, and then took them off and wiped their feet on them.¹³⁰ At the Dilling trial, defense lawyers repetitiously lodged identical objections on behalf of each of the defendants in order to delay the trial and frustrate the judge.¹³¹ But the elements of farce are the result of the specific strategy of the defendant to risk everything to make the government back down, rather than work within the legal process in the hope of gaining a regular acquittal or reduced sentence. In some cases, like the Chicago 8 trial, the farce worked in favor of the defendants, who managed to convince large segments of the public that the justice system or the government was unjust. But, in other cases, like the Dennis case, the farce left the public unmoved, the strategy failed, and the movement petered out. As messy as these trials were, it is far from clear that they were failures, from the perspective of the government.

G. Summary

In political trials, the government and the defendant battle for public opinion. The government seeks to persuade the public that the defendant is a public threat rather than a mere political opponent. If this is true, the government's best strategy is to publicize the trial and give the defendant ample time to make her political defense ("justice is not possible without a proletarian/Islamic revolution"). Any defects in process may be forgiven by the judge, jury, and public, who are glad to see the threat extinguished.

Sophisticated defendants in cases like these, however, will downplay their revolutionary ardor and draw attention to the defects in process. If, for example, the government relies on a general law, the defendant will point out that the government could use the law against mainstream political opponents as well as radicals or

¹³⁰ Danelski, *supra*, at 164.

¹³¹ Belknap, *supra*, at 190-91.

extremists. If the judge or some jurors belong to the out-of-power party, they may be persuaded to acquit in order to protect themselves and their party. Moderates in the public may become suspicious that the government is establishing a precedent with the extremists before turning its attention to mainstream political opponents. If so, they may put political pressure on the government to drop the charges.

The government, then, has the task of persuading the judge, jury, and public that the relaxation of process (or the enforcement of explicit laws against political dissent) is limited to cases involving authentic public threats; this can be done by limiting the law or enforcement action to aliens, people with connections to enemy foreign countries or movements, people with connections to groups that engage in violence, and people with highly sensitive positions (soldiers, spies, government employees), and granting as much process as is compatible with the requirements of secrecy and other expedients. I have also argued that allowing political defenses may be useful.

Complicating matters for the government, the logistical difficulties of running an ordinary criminal trial become political problems in a political trial. The everyday compromises of a normal criminal trial—the judge and prosecutor’s influence over the composition of the jury, reliance on secret evidence or testimony when victims or informers face retaliation, the need to cut off defendants, witnesses, and lawyers in the interest of time, the exclusion of morally relevant but legally irrelevant arguments, the blunders of subpar lawyers and judges—take on heightened significance at a political trial, where a skeptical public may misinterpret these normal compromises as a special effort by the government to deprive the defendant of what they think are the standard protections. When the public is suspicious enough about the government’s motives, then the government might be well advised to give the defendant heightened process and focus on convicting the defendant for violations of normal laws (if any) rather than making his dangerousness the focus of the trial. This may explain why international trials like those conducted by the Yugoslavia tribunal have been so lengthy. The judges fear adverse inferences about their motives from a diverse world, and especially from the extremely suspicious populations from which the defendants are taken, whose strong priors are that

the judges are stooges of the powerful nations. This concern leads the judges to refrain from restricting the defense, and the trials last for years.¹³²

The amount of process granted in a trial is a function of all the factors that we have discussed—the independence of the judge, the availability of defense lawyers, the extent of the right to make a case and cross-examine, and so forth. It is not clear whether each element is essential or whether granting more of one element can make up for less of another; this is perhaps true in some cases but not others. Each factor is context specific. It may be necessary to deny an articulate and charismatic defendant the amount of time available for testimony that is given to a regular defendant. Publicity and even lawyers may have to be dispensed with when the evidence consists of secret materials; in this case, a judge from an out-of-power party may nonetheless serve to constrain the government appropriately. Again, an independent judiciary may be inappropriate when it is tainted—a common problem for trials in transitional regimes—and then a dependent judge will be used; but other protections, defense lawyers, for example, may compensate for the subservient judge.

IV. Variations on the Political Trial

A. Trials of Enemy Combatants

Nations have traditionally detained soldiers captured during a war for the duration of hostilities, and tried and punished enemy soldiers who have committed war crimes. These trials have elements of political trials and ordinary trials. On the one hand, enemy soldiers tried for war crimes are usually granted the same process that one's own soldiers are granted, and the laws of war are generally accepted by nations.¹³³ On the other hand, prosecutions of soldiers reflect military and political goals, more so than prosecutions of ordinary criminals, which may be discretionary by formal law, but are usually a matter of routine, reflecting broad nonpartisan considerations such as the seriousness of the crime

¹³² See Meernik, *supra*; for a discussion of some of the problems, see Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 *Yale J. Int'l L.* 111 (2002), and especially his discussion of the case of Tihomir Blaskic before the ICTY, *id.*, at 122-24. The defendant was unable to acquire apparently exonerating documents from the Croatian government, and he was convicted. The documents came to light after a change in regime in Croatia; Blaskic claims that the prior regime withheld the documents in order to deflect suspicion from its own officials to Blaskic. See also Testimony of Larry A. Hammond before the House International Relations Committee, February 28, 2002 (discussing the Blaskic case and other cases like it).

¹³³ As required by the Geneva Conventions.

and the availability of resources. Immunity is granted to enemy soldiers with intelligence value, technical expertise, managerial skills, and other characteristics that are important to some new war effort or the return to peace. For example, the U.S. granted immunity to Japanese researchers who had conducted experiments involving vivisection on POWs, a price deemed worth paying for their results.¹³⁴ And the victorious army rarely prosecutes its own soldiers for war crimes.

The laws of war extend their protection only to soldiers who meet certain qualifications. They must wear uniforms, carry their weapons openly, belong to a regularly constituted military unit, and meet related criteria. Soldiers who violate these rules are considered spies, guerillas, or, in the current phrase, “unlawful combatants,” and deprived of the rights enjoyed by POWs. Shortly after its entry into World War II, the American military set up a military commission to try German soldiers—including one American citizen—who had snuck onto American territory in order to engage in sabotage.¹³⁵ This type of military commission need not comply with the requirements of the Geneva Convention—for example, it may have less process than the tribunals used for POWs who commit crimes. After the September 11 terrorist attacks, the U.S. government has claimed the right to classify Americans and foreigners as unlawful combatants and to detain them until the end of hostilities. The government also established new military commissions that would have the authority to try American and foreign enemy combatants—members of Al Qaeda and affiliates—for war crimes.¹³⁶

The U.S. government’s 9/11 strategy has received a great deal of criticism. Many critics argue that al Qaeda terrorists should be treated as criminal suspects, and, when captured, given the same process as regular criminal defendants.¹³⁷ Although the courts have not gone this far, they have demanded that the government grant unlawful combatants more process than the government was initially willing to give them.¹³⁸ The

¹³⁴ John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* 465 (1999).

¹³⁵ See *Ex parte Quirin*, 317 U.S. 1 (1942).

¹³⁶ It is not yet clear whether this plan will be acceptable to courts; for an argument that the commissions are constitutional, see Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 *Green Bag 2d* 249 (2002).

¹³⁷ See, e.g., Peter Spiro, *Not War, Crimes*, at http://writ.corporate.findlaw.com/commentary/20010919_spiro.html (Sept. 19, 2002).

¹³⁸ Hamdi, *supra*; Rasul, *supra*.

debate, within the courts and outside them, has emphasized the unfairness of denying process, and the demands of military exigency.¹³⁹

The theory that I have advanced sheds light on this debate, albeit from a different angle. One question—why the 9/11 strategy reflects a military rather than law enforcement approach, when similar actions during earlier wars were undertaken mainly by law enforcement—can be easily answered.

First, the public believes that the threat posed by al Qaeda is enormous; for that reason, it will tolerate a reduction of political competition in order to enable the government to counter the threat. By contrast, the public has had more mixed views about the threats posed by domestic communists, anarchists, and members of other fringe movements. World War I and the Vietnam War had less public support than the war on terror because America's enemies did not pose as palpable a threat.

Second, members of al Qaeda are, for the most part, ethnically and religiously distinct from Americans. As long as the government focuses its investigative efforts on Arabs, Muslims, and aliens from Arab and Muslim countries, and the American public believes that the government's attention is confined to these types of people, the vast majority of the public itself will feel unthreatened by politically motivated prosecutions. By contrast, World War I-era prosecutions often targeted ordinary Americans, especially those affiliated with the labor movement, which enjoyed widespread support.

In these two ways, the closest precedent for the effort against al Qaeda is the internment of Japanese-Americans during World War II. Both cases involved high and palpable risks to American civilians on American territory; and both cases involved an unassimilated, ethnically distinct and politically weak group, which could be targeted for special measures without creating the risk that such measures would be used against mainstream Americans, not even (during World War II) German- and Italian-Americans who were more numerous and more assimilated, and had greater political power.¹⁴⁰

¹³⁹ For various perspectives, see the essays in *The Constitution in Wartime* (Mark Tushnet ed. 2005).

¹⁴⁰ However, the use of military commissions have received more criticism after 9/11 than during World War II. See Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 *Const. Comment.* 261 (2002) (arguing that the difference in reactions is due to greater suspicion of government, greater respect for civil rights, and the lesser magnitude of the threat).

Third, the war against terror is a bipartisan effort, and the government cannot credibly accuse the opposition party—the Democrats—of being supporters of al Qaeda, so the government cannot plausibly classify Democrats as enemy combatants. The current situation bears no resemblance to the Sedition Act prosecutions, which were brought by Federalists who believed that the Republicans had allied themselves with France, then America’s enemy in an undeclared war.¹⁴¹ Nor does it even resemble the Cold War, when Republicans could castigate the Democrats for being soft on communism but never tried to bring criminal charges against mainstream Democratic opponents.

All of this suggests that reduced process protections during the war against terror do not provide the Bush administration with real opportunities for targeting political opponents; thus, few people regard the trials and detentions as motivated by partisan political objectives. To be sure, these trials and detentions may be mistaken, unfair, opportunistic, and political in the sense of being designed to show the public that the government is doing something when it’s really not doing much. But this doesn’t distinguish them from ordinary law enforcement practices. As long as al Qaeda and similar groups pose a genuine public threat, and as long as these groups are unable to acquire significant support from mainstream Americans, the reduction in process protections tolerated by the courts so far can be explained using the instrumental theory of liberal legalism.

B. Transitional Trials

Transitional trials are easily understood within the instrumental framework I have been discussing. The transitional government faces a delicate situation: it must, on the one hand, satisfy demands for substantive justice against the old regime, and eliminate the influence of remnants that continue to hold important positions in the military, bureaucracy, and economy. On the other hand, the transitional government must avoid the accusation that it is using transitional trials to do what the old regime did: eliminate political opponents through a perversion of the judicial process. Transitional governments have balanced these considerations in several ways.

¹⁴¹ See *supra*.

First, the government relies on the exceptional nature of the transition and the crimes of the members of the old regime. Their chief crime (in a moral sense) was the rejection of liberal legality; they are being punished, in part, for that crime. The public watching the trial need not infer that ordinary individuals will be similarly denied due process once the transition has been completed and the regime has entered the phase of normal politics. Retroactivity, in a paradoxical way, reduces concerns of political motivation by indicating that younger people untainted by the past have nothing to fear from the courts.

Second, the government grants the defendant as much process as is compatible with the retroactive nature of the trial. This is not trivial, involving the assignment of a lawyer, the chance to testify and cross-examine, publicity, and so forth. A government bent on eliminating its political opponents would not give them these rights.¹⁴² The lesson is that the government may, and should, exercise restraint when pursuing its political opponents. This may seem like a modest lesson, but it is an important one in states emerging from decades of totalitarianism.

Third, governments rely heavily on legal fictions to conceal the political motivation of the prosecutions. I will say more about this tactic in Part IV.C., below.

Finally, some governments use administrative proceedings rather than trials. In Czechoslovakia, for example, administrative proceedings were used to identify and “lustrate” former officials and collaborators, who were deprived of positions in the government but could resume a normal life.¹⁴³ These proceedings reduced both process and punishment. The government thus could not take advantage of the limited process in these proceedings to eliminate its political opponents, only to embarrass them, and the embarrassment was anyway connected to the source of the transitional government’s legitimacy—the decisive public rejection of the old regime.

C. Pedagogical Trials

Much discussion of political trials concerns a second-order issue: the educational message that they send to the public. Uncomfortable with the notion that a trial could

¹⁴² Such as Stalin; see Conquest, *supra*.

¹⁴³ See Posner and Vermeule, *Transitional Justice*, *supra*, at 762.

ever be justified by public demands for retributive justice or the dangers posed by a public threat, scholars have instead focused on how political trials may teach the public liberal values. Four examples will illustrate this argument.

First, Jon Elster and other scholars argue that transitional trials may be justified as a way to educate the public about the rule of law.¹⁴⁴ Observers of the transitions feared that liberal democracy would not take hold in societies in which the rule of law had been repudiated for decades. By conducting fair trials of members of the old regime, transitional trials would dramatically show that the rule of law extends even to its enemies.

Second, Judith Shklar argues that the Nuremberg trial was justified as a device for creating new norms of international illegality.¹⁴⁵ Prior to those trials international law did not prohibit genocide and other crimes against humanity; the trial helped established that this behavior was criminal. In doing so, the Nuremberg trial helped extend international law beyond its traditional application to states and into the realm of human rights.

Third, several scholars have pointed out that the Nuremberg trial placed “on the record” thousands of archival documents that showed how the Nazis engineered the Holocaust.¹⁴⁶ Truth is a liberal virtue, and documenting atrocities is thus a liberal duty. This argument was used by those who supported the establishment of the tribunals charged with trying perpetrators of crimes against humanity in the former Yugoslavia and Rwanda.¹⁴⁷

Fourth, many domestic political trials have been intended to teach the public about emerging threats. The trials of Jeffersonian Republicans were intended to show that the defendants were in league with America’s enemy, France. The trials of Nazi

¹⁴⁴ See, e.g., Teitel, *supra*. Walzer makes an analogous argument about the executions of Charles I and Louis XVI, that democracy could not be established until the subservient habits that evolved in a monarchy were eliminated, and for this the symbolism of the trials were of great significance. See Walzer, *supra*, at 86-89 (1974).

¹⁴⁵ Shklar, *supra*, at 170-79.

¹⁴⁶ See, e.g., Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001) (arguing that these trials can successfully reconcile the demands of legal process and of history).

¹⁴⁷ This is emphasized by Osiel, *supra*, at 53-55, who argues that political trials in transitional settings are important for shaping the collective memory of past atrocities.

sympathizers and Communists were intended to show Americans that the Nazis, then the Communists, posed a threat to American security.

The Conflict Between Proof and Pedagogy. The educational purpose of political trials is different from their main purpose, which is to counter public threats or do substantive justice, but not necessarily inconsistent with it. However, in practice the main purpose of the trials take precedence, and obscure their educational impact. As several critics have noted, the transitional trials might be interpreted not as a vindication or even illustration of the rule of law, but as the opposite: that judicial process and the rule of law can be disregarded when the defendants are political opponents.¹⁴⁸ After all, these trials resulted in the conviction of people for activities that did not violate any law at the time that they occurred. This apparent dilemma has also bothered critics of international war crimes trials who fear that the educational purposes of these trials may corrupt the judicial process.¹⁴⁹

The criticism is too simple, but it does have an element of truth. The trials were meant to show, in part, that the old regimes' great sin was their disregard of liberal legalism; *not* to punish members of the old regime would also send the wrong message, as it would indicate that tyrants are not punished for their tyranny. The lesson of the transitional trials was that, if political opposition may be tolerable within the constraints of a liberal constitutional order, the rejection of liberal democracy is never tolerable.

This message was not, however, delivered in the most candid way. Rather than forthrightly announcing that certain political beliefs and systems would not be tolerated, the governments surrounded the judicial proceedings with legal fictions. The fictions implied that the defendants were being tried and punished for committing crimes recognized as such during the old regime.

In the trials of East German border guards, for example, many jurists claimed, and some judges held, that the conviction could be based on prior law—including international treaties such as the International Covenant on Civil and Political Rights, international *jus cogens* norms against human rights violations, West German law on the

¹⁴⁸ See the discussion and citations in Posner and Vermeule, *supra*, at 762-65.

¹⁴⁹ See Arendt, *supra* (criticizing the Eichmann trial for this reason).

theory that East German law was never valid because East Germany never had sovereignty, natural law, and East German law that on its face could be interpreted as prohibiting the border killings.¹⁵⁰ These were all subterfuges: the ICCPR and jus cogens norms were never thought to apply to domestic prosecutions like the border guard cases; and East German law, whose pre-unification domestic validity was acknowledged by West Germany in the unification treaty, authorized the border guards to kill people who were trying to escape. Academics who recognize the force of retroactive justice in the transitional setting nonetheless find the lack of candor intolerable. Let the governments prosecute the remnants of the old regime for the misery they inflicted, says Jon Elster; but make them admit what they are doing.¹⁵¹ Hannah Arendt anticipated this reaction with nearly identical comments about the Eichmann trial: don't pretend that Eichmann broke the law; admit that the motivation for the trial was revenge.¹⁵²

These criticisms reflect the worry that the trials will not educate people if they send muddled or mixed messages. But we can see why it is unwise to use political trials for educational purposes by asking why the German government and courts did not follow Elster's recommendation. Surely, the government's main concern was obtaining convictions—both to appease longstanding outrage at the actions of the border guards in West Germany, and to show East Germans that such behavior would no longer be tolerated. The judges appeared to have seen the force of these goals, but their jobs were to enforce the law, not implement official policy, and it is hard to imagine them candidly announcing that they would order the border guards to jail even though they broke no law. The educational goal of the trials ran up against the bureaucratic realities of a modern liberal state.

Making a Historical Record. One purpose of the Nuremberg trial was to provide a record of the Holocaust.¹⁵³ The extensive German documentation of the concentration and death camps could be entered into the record of the trial; films of the atrocities were

¹⁵⁰ Posner and Vermeule, *supra*, at 793-95; Kif Augustine Adams, *What Is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 *Stan. J. Int'l L.* 272 (1993).

¹⁵¹ See Hart, *supra*, at 619-20; Jon Elster, *Moral Dilemmas of Transitional Justice* 7-8 (unpub. m.s. 2002).

¹⁵² See Arendt, *supra*.

¹⁵³ Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 *Foreign Affairs* 179 (1947).

also shown.¹⁵⁴ The French referred to their trial of Klaus Barbie as a “pedagogical trial” because its purpose was to teach the public about French complicity in the Holocaust.¹⁵⁵

But as the Nuremberg trial shows, the efforts to provide a record of history conflicted time and again with the much more important goal of proving the charges. The Nuremberg and Tokyo prosecutors sought as defendants representatives of important segments of the population. The German and Japanese publics needed to learn that the rot had spread throughout the military, the bureaucracy, and the industrial elite. A trial of four army generals would not be as effective as a trial of one general, one admiral, one diplomat, and one industrialist. At Nuremberg, Justice Jackson sought to implicate German industry; but when a natural choice—Adolf Krupps—turned out to be too ill to stand trial, Jackson’s demand that his son Gustav be substituted outraged the judges, and they refused.¹⁵⁶ In Japan, the prosecutors made sure to charge not only representatives of each component of the Japanese government, but also to make sure that there was representation for each time period—during the attack on Manchuria as well as the attack on Pearl Harbor, when government officials had changed in the meantime.¹⁵⁷ These choices all contributed to a satisfying narrative arc, but they also made the government vulnerable to the argument that the trial was intended for propaganda, not to establish the truth.

Nuremberg illustrates other compromises. Because the trial had to be conducted with dispatch, many atrocities were not discussed: the records had not yet been discovered.¹⁵⁸ Because the prosecutors relied on documentation rather than witnesses, undocumented but amply witnessed events were also downplayed. Most important, each state had different preferences about which events to emphasize and which to suppress. For the Russians, the goal was to show the world the extent of the sacrifice of the Russian people, and to conceal Russian aggression against Poland and other innocent states, and Russian atrocities. This was not the aim of the Americans, who preferred to emphasize the guilt of German leaders for waging aggressive war, not against the Russians in

¹⁵⁴ Tusa and Tusa, *supra*, at 101.

¹⁵⁵ See Douglas, *supra*, at 186.

¹⁵⁶ Tusa and Tusa, *supra*, at 138-39.

¹⁵⁷ Solis Horwitz, *The Tokyo Trial*, in *International Conciliation*, No. 457, pp. 473, 495-97 (1950).

¹⁵⁸ Robert E. Conot, *Justice at Nuremberg* 87-88 (1983); Marrus, *supra*, at 193.

particular, who were also guilty of this offense. A similar problem arose over the charge that the German invasion of Norway was part of its conspiracy to engage in aggressive war; the Nazis responded that they had merely preempted a British and French invasion of Norway—which was true, and embarrassing to the British, who refused to release secret documents to the defense that would have validated its claim.¹⁵⁹ Events that placed the victors in a bad light were suppressed as much as possible, and indeed the indictment included a charge that the Germans had massacred the Polish officers at Katyn Forest, even though everyone suspected the Russians.¹⁶⁰ As is always the case in trials, the establishment of the truth, in all its nuance and complexity, is subordinated to the immediate goals of proving or refuting the charges.¹⁶¹

Teaching Moral Lessons. Even when the truth comes out, it does not necessarily follow that the right lessons will be learned. The allies initially hoped that the Nuremberg trial would teach the Germans and their own publics that the German leaders were evil: that there was no possible justification for their behavior. The dual goals were the education of the Germans about their own leadership, so that they could reconcile themselves to a new order where Germany would be ruled by foreign powers or else have greatly reduced international status; and vindication of the political leadership of the allied countries.¹⁶²

Thus, throughout the trial the prosecutors and judges feared that the defendants would argue that (1) the war crimes committed by the Nazis were matched by war crimes committed by the allies; and (2) Germany's behavior was justified by the Versailles treaty, and was abetted by the British and the French during the 1930s, who ratified many of the formal violations of the Versailles treaty by the Germans, and further by Russia,

¹⁵⁹ Marrus, *supra*, at 138-39.

¹⁶⁰ *Id.*, at 56-57. The Soviets subsequently presented witnesses testifying as to German responsibility for the massacre, but when they tried to prevent the Germans from providing their own witnesses, their motion was refused by the tribunal. *Id.*, at 100-01.

¹⁶¹ For another example taken from the Klaus Barbie trial, see Douglas, *supra*, at 189 (discussing the way that the requirements of legal form caused prosecutors to downplay the most serious aspects of Barbie's crimes). Osiel provides further examples from the Barbie, Nuremberg, Eichmann, and Argentine junta trials, *supra*, at 79-141.

¹⁶² Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial 13-14* (2001) (quoting Jackson's statements at the London Conference where the Nuremberg charter was drafted).

which cooperated with Germany in many ways.¹⁶³ Although not many citizens of allied nations would be receptive to these arguments, German citizens might have been; thus, the trial, like the Versailles treaty itself, could become a rallying point for unreconstructed Nazis and nationalists in Germany.

Although the defendants did make these arguments, they did not have the expected effect. The Germans at first ignored the trial, regarding it as irrelevant or an exercise in allied propaganda. But then something surprising happened: the Germans began to feel that they were themselves on trial. The trial made clear the vast participation of ordinary citizens in the Nazi extermination machine.

That had never been Jackson's intention. He, like many others, had hoped to prune out Nazism and induce healthy growth in remaining Germany. The idea of German guilt had not appeared in the indictment. It had emerged during the trial.¹⁶⁴

But a guilty nation was not a nation that could rejoin the world community as a liberal democracy. If there was something wrong with Germans, how could they be given political responsibility? And the notion of German guilt would become particularly difficult for the Americans as it became clear, part way through the trial, and to the premature delight of the defendants, that the Germans would be America's allies in the gathering Cold War against the Soviet Union.¹⁶⁵ Polling data suggest that the Germans initially thought that the trial was fair, but after a few years there was a dramatic change in attitudes and by the 1950s the dominant view was that the trials were unfair and the convictions were victor's justice.¹⁶⁶

The Tokyo war crimes tribunal had the opposite but equally unwelcome effect. The Japanese did not feel themselves on trial, or guilty, though they were horrified when they learned about the atrocities committed by their soldiers. But as bad as their soldiers

¹⁶³ *Id.*, at 260, 304.

¹⁶⁴ *Id.*, at 223.

¹⁶⁵ Churchill's "iron curtain" speech at Fulton, Missouri, was the turning point. See Tusa and Tusa, *supra*, at 201.

¹⁶⁶ See Public Opinion in Occupied Germany: The OMGUS Surveys, 1945-49, pp. 93, 121, 138 (Anna J. Merritt and Richard L. Merritt eds. 1970); Public Opinion in Semisovereign Germany: The HICOG Surveys, 1949-1955, p. 101 (Anna J. Merritt and Richard L. Merritt eds. 1980); and see generally Richard L. Merritt, *Democracy Imposed: U.S. Occupation Policy and the German Public, 1945-49*, pp. 160-73 (1995). The trials did not have measurable impact on American public opinion. See William J. Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials* 87-116 (1970).

were, they did not seem any worse than the Americans, who had killed hundreds of thousands of civilians through fire bombing and atomic bombing. The trial gave the defendants an opportunity to defend Japan's militarism, an opportunity seized by Tojo, and with great success.¹⁶⁷ Tojo argued that Japan had acted in self-defense against colonial aggression. "Only victor nations sat on the Bench, many of them colonial powers with far longer records of imperialism than Japan—and they allowed the colonies they were intent on regaining no place among the judges."¹⁶⁸ The trial suggested the moral equivalence of the victors and vanquished with respect to aggression, but the victors had a monopoly on hypocrisy.

A great problem for the Tokyo trials was the decision by the U.S., made prior to the initiation of the trial, to allow the Japanese emperor to retain his throne. As a result, he could not be on trial, even though he was the one person who had formal—and probably personal—responsibility for all aspects of Japan's aggression. Trying to tie together disparate defendants in a conspiracy when the one person they had in common was absent was a nearly impossible task.¹⁶⁹ The U.S. had its reasons for immunizing the emperor: American officials believed that a cooperative emperor was their best means for persuading Japan to surrender and then governing it. Here, as at Nuremberg, the need to cooperate with defeated officials and leaders warred with the desire to do justice, and the result was a message with little educative value, at least little that would directly serve the interests of the U.S. The trial was widely regarded as a political failure.¹⁷⁰ Japanese citizens did not see the trial as a vindication of the rule of law but as victor's justice. The trial contributed to a resurgence of nationalism during the postwar years.¹⁷¹

However, nationalism did not reassert itself in all quarters, and one historian argues that the trial—because it was a caricature of justice—contributed to postwar Japanese pacifism. "The crimes revealed by the trial, compounded by the perception that this was a world gone mad with violence and that such crimes against peace and humanity were not unique to Japan, reinforced the deep aversion to militarization and war

¹⁶⁷ Meirion Harries and Susie Harries, *Sheathing the Sword: The Demilitarization of Japan* 163 (1987).

¹⁶⁸ Harries and Harries, *supra*, at 175; see also Dower, *supra*, at 471.

¹⁶⁹ Dower, *supra*, at 460.

¹⁷⁰ Harries and Harries, *supra*, at 175-76. See also Osiel, *supra*, at 181 & n. 43 (citing sources).

¹⁷¹ Dower, *supra*, at 444.

that had come with defeat.”¹⁷² If this was the lesson that the Japanese drew from the trial, it certainly was not the lesson intended by the Americans, who sought to remilitarize Japan as an ally against the Soviet Union, and who not only abandoned further war crimes prosecutions after the Tokyo trial was over, but (like in Germany) cooperated with and supported war criminals, including a future prime minister, who could be useful in the Cold War.¹⁷³ Political trials may have an educative function, but this function is often out of the hands of those who conduct them.

Why Education? The educative performance of political trials thus has a sorry history. Whether or not they result in convictions, they never teach exactly the kind of lesson that the government has in mind. The question, then, is why might a government be willing to undergo the risk of a trial to educate the public; why not send educative messages through propaganda, official statements, and other routine channels? Or if the government does want to discover and publicize the truth about historical events, why not use truth commissions?¹⁷⁴

One answer is that the government believes that it can win a public political contest with its enemies; and the trial becomes a forum, like a legislative house, where a policy debate is engaged. The value of the message is heightened if the defendant has a fair chance to refute it but fails to win over the public even though his life or freedom are at stake and so he is a natural object of sympathy. To be sure, the government cannot present its message in as unadulterated a form as a propaganda message; but the message of the trial, because of the presence of the defendant, is more credible if it succeeds.

This argument is similar to the instrumental theory advanced earlier. The earlier argument held that political trials occur because governments need to maintain their credibility—that they serve the interest of the public, and are not merely interested in eliminating partisan opponents—when attempting to counter public threats. In the current argument, the defendant himself is not necessarily a real threat, but his message is. The

¹⁷² *Id.*, at 474. For a general discussion of Japanese attitudes about the Tokyo trial, along with a comparison to German attitudes about the Nuremberg trial, see Ian Buruma, *The Wages of Guilt* 159-68 (1994).

¹⁷³ *Id.*, at 525-26.

¹⁷⁴ For a survey of truth commissions, see *Truth Commissions: A Comparative Assessment* (Harvard Law School Human Rights Program ed. 1997).

government gives the defendant the chance to publicize his views because the government believes that the public will reject them.

This argument helps explain why international political trials are always promoted and conducted by liberal democracies—which might seem paradoxical, given the rarity of domestic political trials in liberal democracies, and their frequency in authoritarian states. The explanation is that the liberal democratic system has greater international appeal than any particular authoritarian system, because authoritarian systems always elevate the interests of some national or religious or ideological group; democratic systems are, in principle, universalistic. Every international political trial has been intended as a story about how an authoritarian government led its people astray, and, by implication, about how liberal democracies are superior. The creators and managers of trials are not always correct; sometimes, a trial does not convince anyone of anything. But the greater appeal of trials to democratic governments is easily understood.¹⁷⁵

D. International Criminal Trials.

1. General Considerations

The international criminal trial¹⁷⁶ is a special type of political trial. The “defendant” is now a soldier or former leader of a (usually) defeated state; the prosecuting “government” is now a foreign power, or a coalition of foreign powers, which vanquished the other state. The victor’s main goal is to eliminate the hostile government of the defeated state—its leaders and its supporters. The purpose of the trial is to define the category of individual, government, or state behavior that will not be tolerated by the victors, so that the rest of the world will understand what kind of behavior will elicit an international military response and what kind of behavior will not.

¹⁷⁵ Gary Bass, by contrast, argues that international trials occur because of the power of the legalist ideal. Leaders of liberal democracies seek to impose liberal values on defeated countries; the trial suggests itself as one way to advance this goal. See Bass, *supra*, at 8. There are two problems with Bass’s argument. First, the story breaks down at the domestic level: both ordinary authoritarian governments and democratic governments rely on courts. Second, international criminal trials from Nuremberg on do not reflect the legalist idea because they do not conform to the rule of law. They are attempts to impose liberalism on other countries.

¹⁷⁶ I use this term to refer to trials of leaders and other major actors; for trials of ordinary soldiers and civilians, see Part IV.A., *supra*.

The Nuremberg trial, for example, was an ambitious effort to define new rules of international conduct that would make a repetition of the two world wars impossible. The world wars were blamed in part on great power rivalries, and the understanding that states were permitted to go to war for political objectives. Thus, one of the Nuremberg charges was violation of the crime of “aggressive war.” And the conduct of World War II, with the German government’s mass slaughter of its own citizens as well as foreign citizens, led to the invention of “crimes against humanity.” These two crimes, and the notion that individuals (as opposed to states) could be charged for violating them, were all innovations.¹⁷⁷ Ideally, if individuals in future knew that they could be punished for the crimes of aggressive war, crimes against humanity, and also ordinary war crimes (also a subject of the Nuremberg trial, but not an innovation), they would be deterred from starting wars or conducting them too brutally.

The Nuremberg trial had many of the elements of domestic political trial. The victorious governments, led by the United States, sought to accomplish two things. First, they wanted to eliminate the major Nazi figures. This could have been accomplished with summary execution—an option that was widely discussed and seriously considered. But there was a second goal as well. This was to show the world, including the citizens of Germany, the citizens of the victorious nations, and the governments of other countries, that there would be a new international order, one in which governments would not be permitted to engage in aggressive war (that is, use military force to disturb the status quo), commit war crimes, and commit atrocities against their own citizens such as genocide. The penalty for violation would be criminal prosecution. The flip side of this aggressive stance was that nations that did not do any of these things had nothing to fear from the United States and the Soviet Union, or from any other major power. Or, to shoehorn this analysis into the earlier categories, legitimate international political competition could no longer involve aggressive war or crimes against humanity.

The advantages of holding an international criminal trial after World War II can now be seen. The trial would show that the victorious powers were not interested in

¹⁷⁷ Prosecutors claimed that the Kellogg-Briand pact could provide the basis for the crime of aggressive war, but that agreement was not understood to create legal obligations, and certainly not criminal law applying to individuals, and was in any event a dead letter.

eliminating any person who happened to be a threat to their international ambitions, nor even in exercising the traditional victor's prerogative of taking retribution or revenge. The victorious powers sought to punish only those who had, through their actions, endorsed the notions that aggressive war, genocide, and similar actions were legitimate forms of international action. To persuade the world of their good faith, the victorious powers had to give the defendants an opportunity to be heard, to show that they had not engaged in the actions that, under the new order, would be considered crimes. Otherwise, the world would have no reason to believe that the victors sought to create a new international order that involved some self-restraint on their own ambitions.

This was the ideal, but the managers of the trial ran into trouble from the beginning. None of the victors had acted consistently with the new rules that they were now pressing on the Germans, so the world might understandably react with skepticism to the victors' claims that the rules were sustainable. Russia had engaged in aggressive war against Poland, Finland, and the Baltic states; the United States had dealt with its own internal racial problems with highly oppressive laws that could be likened to crimes against humanity; and all sides had committed atrocities in their conduct of the war. Within limits, the charges could be qualified; the Americans, for example, insisted that an element of the crime against humanity is that the atrocities occur in a wartime setting, so as to avoid the charge that America's racial laws were crimes against humanity. The defendants could, and did, try to make an issue of these inconsistencies; they could, and were, shushed by the courts; but the fact remains that the rest of the world knew about them. The problem was not so much one of victor's justice, but a more basic problem about world order. If the states that were pressing for new norms of international conduct had never complied with them, what reason was there to think that they could be sustainable?

At roughly the same time, the managers of the Tokyo trial were running into similar problems. The goal of this trial was the same as the goal of the Nuremberg trial: to eliminate powerful and influential people in the Japanese government and show that their elimination was tied to their violation to new norms of international legality which would provide the basis for a peaceful world order. The problem was, again, that the United States as well as Japan had committed war crimes, and, although Japan had

clearly brought war to the United States, the roots of this war could be traced to a competition between two great powers for colonial influence in the west Pacific. No clear norms differentiated the conduct of the United States and Japan—Japan had Nanking, the United States had Hiroshima. These points were made by one of the dissenters, Justice Pal.¹⁷⁸ For Pal and other critics such as Shklar, the difference between Nuremberg and Tokyo was that the Germans engaged in mass extermination of their own citizens; the Japanese did not (though they did kill thousands of foreign citizens).¹⁷⁹

The literature considers Nuremberg a success and Tokyo a failure. One might doubt this judgment, and conclude that both were failures. As noted above, neither trial had clear, beneficial effects on public opinion; neither trial established much of a precedent. International criminals trials would not be used against for almost 50 years. By contrast to domestic political trials, we might infer that international political trials are unlikely to succeed because there is no international consensus on the line between legitimate (international) political competition and illegitimate international political competition. A consensus of states was not willing to accept the premise, for example, that a great power should not start a war in order to protect access to resources, as Japan did.

If Nuremberg and Tokyo were failures, or if Nuremberg alone was a success because of the uniquely evil behavior of the Nazis, it can be readily understood why subsequent international criminal trials have been sparse, and not particularly successful. The problem has always been that the U.S. and other states have been complicit in the reign of the defeated leader or that it has been unable to obtain a complete surrender. Noriega, Saddam, Milosevic—these are people whom the U.S. at one time or another dealt with as legitimate leaders.¹⁸⁰ Thus, the claim that they should be prosecuted for engaging in illegitimate behavior rings hollow. The judges have tried to deflect charges of bias by granting defendants an extremely high level of process, with the result that the trials drag on for years and defendants use their trials as platforms for stirring up

¹⁷⁸ See Dower, *supra*, at 471-72.

¹⁷⁹ *Id.*; see also Shklar, *supra*, at 188-90.

¹⁸⁰ See also Testimony of Larry A. Hammond before the House International Relations Committee, February 28, 2002. He points out that the U.S. provided assistance to the Croatian offensive against Serbia, and may have been complicit in Croatian war crimes.

resentment and xenophobia at home.¹⁸¹ But no amount of process can overcome the fundamental problem of bias, which has nothing to do with the procedures, but the bare fact that the trials are used by strong nations to assert their international ambitions at the expense of weak nations.

2. The International Criminal Court

If only the strongest states have the power to establish international tribunals, determine their membership, set their agenda, and thus influence the development of international criminal law, predictably the resulting norms of international criminal law will reflect the interests of the strong states, not the weak states. Thus, as we have seen, at Nuremberg crimes against humanity were tied to war in order to immunize the United States from claims that its racial policies violated international criminal law. But weaker states could hardly be expected to submit to such an international order, and their efforts to gain influence have resulted in the establishment of the International Criminal Court.

The ICC has an independent prosecutor and tribunal, and jurisdiction over international crimes committed by nationals of state parties and over international crimes committed on the territory of state parties.¹⁸² In theory, the ICC prosecutor decides on prosecutions in the same impartial way that ordinary prosecutors are supposed to: on the basis of the seriousness of the crimes and the amount of resources available. What would this mean? Prosecutors would need to make the case that the crimes that they investigate are more serious than the crimes that they do not investigate; judges would need to persuade the world that convictions and sentences flow impartially from the extremely vague rules of law.

This structure avoids the obvious forms of victor's justice, but introduces its own set of problems. On the one hand, because the UN security council no longer chooses the crisis that will become subject to investigation and prosecution,¹⁸³ and its members who are ICC signatories can no longer immunize themselves from prosecution, defendants

¹⁸¹ These problems are discussed by witnesses before a House hearing; see The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show Justice, Hearing before the House Committee on International Relations, February 28, 2002.

¹⁸² International Criminal Court Statute, art. 12.

¹⁸³ It does have referral power, however, and an extremely weak power to defer investigations. See ICC arts. 13(b), 16.

will not be able to argue that the ICC is a tool of the great powers, used to suppress weak states they do not like rather than weak states that are allies. On the other hand, the ICC prosecutor and judges will be human beings with their own national origins and biases, and eager to satisfy whichever governments determine whether they retain their positions or obtain new ones. International politics will still determine who is prosecuted and tried, which means that defendants will be able to argue that their trials are politically motivated.

One might argue that the new politics of international criminal adjudication under the ICC will reflect something like a global consensus on international crime, rather than the views of the United States, Russia, China, Britain, France, and a few other members of the security council. Defendants will thus be arguing against the world, not a few great powers, and the claim of political motivation will be weaker. However, this benefit is purchased at a high price. Because the great powers no longer see themselves as having dominant influence over the development of international criminal law under the ICC, they have no reason to support it.¹⁸⁴ Thus, the main military and economic powers—predominantly, the U.S. but also Russia and China¹⁸⁵—have made it clear that they will have nothing to do with the ICC, and the U.S. has gone to great lengths to undermine it.¹⁸⁶ Deprived both of the political support of the most powerful countries and the military means that these countries supply, the ICC is a frail institution with a dim future.¹⁸⁷

International criminal trials, then, are analogous to domestic trials in a divided state. When the public is sufficiently divided, all trials will look like efforts by the government to eliminate its political opponents rather than vindications of community norms incorporated in the law. In the international setting, international criminal tribunals

¹⁸⁴ For a discussion of these problems, see Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. Chi. L. Rev. 89 (2003).

¹⁸⁵ A list of states parties can be found at <http://www.icc-cpi.int/php/statesparties/allregions.php>.

¹⁸⁶ The U.S. has compelled numerous countries to agree not to refer Americans to the ICC. See Human Rights Watch, *Bilateral Immunity Agreements*, <http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf>.

¹⁸⁷ The latest evidence for this claim is the impasse between the U.S. and other security council members over whether international crimes committed in Darfur should be referred to the ICC or to the existing Rwanda tribunal or some other ad hoc tribunal. See Reuters, *Most UN Council Members Favor ICC Role in Darfur*, <http://www.reuters.com/newsArticle.jhtml?type=worldNews&storyID=7654400>.

will similarly look like efforts by the governments that influence the prosecutor and judges—whether the Security Council, in ad hoc cases, or the members of the International Criminal Court—to harass or embarrass states with contrary foreign policy objectives. The states whose nationals are being tried will always make this charge, however faithfully the prosecutor and judges try to carry out their duties.

This charge will be hard to deflect, not only because it is difficult to prove to the world that it is hard to convict a criminal who has not been tried; but also because one's judgment of the seriousness of a crime is unavoidably political. Suppose, for example, that leaders in a war of national liberation are responsible for deaths of thousands of civilians, who have been inadequately separated from the battlefield, whereas the authoritarian government on the other side has killed only a few hundred. Are the revolutionaries' crimes more serious because more extensive or less serious because in the pursuit of a good cause? Would it matter if the rest of the world sided with the authoritarian government, or with the rebels; or what if the rest of the world is split between them?

The American experience with domestic political trials is instructive. Domestic political trials can be politically successful only when they target extremists who can plausibly be considered threats—in the long or short term—to American political institutions and mainstream values. When domestic political trials are used against mainstream political opponents, as during the Federalist period, they contribute to political division rather than overcoming it. The Nazis, uniquely in modern history, committed extraordinary atrocities, threatened all of the world's major powers, and were thoroughly defeated; in these unique circumstances, there was enough international political consensus about the undesirability of the Nazi system to make an international trial possible—albeit one that was heavily controlled and quite controversial. Every other international trial has been a political failure either because it has introduced further divisiveness into an arena where consensus was absent, or because such divisions prevented it from accomplishing its goal.

Conclusion

Political trials owe their uneasy status in liberal democracies to their paradoxical role, which is to eliminate enemies of a system devoted to political tolerance. In a political trial, the normal constraints of liberal legalism yield, with judicial and public acquiescence, to the political imperative of self-preservation, but their relaxation also creates an opportunity for the government to stifle legitimate political competition. Why don't governments, then, conduct political trials more often? The reason is that people understand that political trials can be used for partisan purposes, and a government that conducts political trials thus takes the risk that the public, or a large portion of it, will withdraw support. For this reason, governments in liberal democracies conduct political trials only when they can plausibly claim a national emergency, and the public tolerates and approves of such trials only when it believes that the national emergency justifies giving the government powers that it can misuse for partisan gain as well as properly use against legitimate public enemies. Governments can further enhance their political support, however, by granting "political process" to the defendants in political trials—the power to make a political defense of their activities. Whether the trial is conducted for partisan gain or public safety itself becomes an issue in the trial, and by allowing this issue to be addressed, the government shows that it believes that its policies enjoy the support of the public and the defendant's views do not. The political trial is a high stakes exercise. If the government persuades the public that the defendant and/or his views pose a threat to the nation, then its legitimacy will be enhanced, and the threat will be removed. If it does not, then it may lose public support and provoke a constitutional crisis.

If this view is correct, the traditional criticisms of political trials are incorrect. It is too simple to criticize a political trial on the grounds that the defendant is being punished for his beliefs, or that the judge unfairly relaxes normal process protections. Political trials can go awry, resulting in unfairness, the suppression of political competition, and other bad consequences, but the same can be said about ordinary criminal trials if they are poorly conducted. The instrument itself cannot be condemned on account of its misuse; the question is how to prevent misuse.

In the case of domestic (including transitional) political trials, the real issue is whether the government makes a plausible case that the defendant—alone, or as part of a

group, or as a symbol for a certain message—poses a genuine threat to the constitutional system. If not, it is reasonable to object to the trial on the grounds that the government is using the judicial process to eliminate legitimate political opponents. But what makes the question difficult in any case is that the government will have legitimate reasons not to disclose all its evidence, and can point to heightened security risks that justify public and judicial deference to its claims. In the case of international political trials, the real issue is whether the defendants or their world view pose a threat to the international order, or at least are likely to make it worse rather than better. On this view, the conventional wisdom about Nuremberg is incorrect. It was not justified because it created new norms of international crime: those norms could have been created without a trial, via treaty-making. It was justified because, or to the extent to which, it persuaded people around the world to abandon fascism and embrace liberal democracy, if in fact it did do this.

The role of judges in both the domestic and international cases is, to large extent, political. In the domestic cases, judges will not always know whether a prosecution is a regular criminal action or a political action, but they will have their suspicions. When they believe that the prosecution is political but are unsure whether the defendant is a public threat or not, then they often do—and perhaps ought to—relax legal process and demand political process. Relaxing legal process may include broadly interpreting statutes, permitting selective prosecution or retroactive lawmaking, limiting the choice of defense lawyer, and preventing the defendant from seeing classified evidence; or acquiescing in military trials. Granting political process includes, chiefly, allowing the defendant to mount a political defense—typically, that the government’s motives are partisan and the judicial system is corrupt. As the decorum of the judicial forum yields to the circus-like atmosphere of democratic politics, many people will be moved to condemn the trial as a farce. But allowing politics into the courtroom may be preferable to the stark alternatives: preventing the government from countering genuine public threats or allowing the government to eliminate its political opponents under cover of judicial process.

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