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LIBERALISM AND THE WORST-RESULT PRINCIPLE:

PREVENTING TYRANNY, PROTECTING CIVIL LIBERTY

by

CANDICE DELMAS

Under the direction of Andrew Altman

ABSTRACT

What I dub the "worst-result" principle is a criterion that identifies civil war and tyranny as the worst evils that could befall a state, and prescribes their prevention. In this thesis, I attempt to define the worst-result principle's concrete prescriptions and institutional arrangements to meet these. To do so, I explore different understandings of the worst-result principle, that each contributes to the general argument. Montesquieu's crucial insight concerns the separation of powers to prevent the state from collapsing into despotism. Judith Shklar shows that 'damage control' needs to be constantly performed so as to minimize chances of governmental brutality. Roberto Unger points at the importance of encouraging citizens' involvement in the political process to safeguard freedom. I finally argue, in the light of historical evidence, that it would be unreasonable to think that the task of preventing tyranny can be effectively performed in the absence of courts entrusted with checking powers.

INDEX WORDS: Organization of power, Tyranny, Prevention, Montesquieu, Shklar, Unger, Japanese Interment cases, Judicial review, War on Terror

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CANDICE DELMAS

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2006

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Introduction

For many centuries, political theorists took the ancient Greek city-states as models for democracy. However, most modern political thinkers have recognized that Western societies have grown far too large for such models to be helpful in the design of political institutions. Yet, the larger the population, the harder it is to find an agreement on the political arrangements. Large-scale societies are likely to break apart if internal conflicts divide the people and excite a civil war. The state aims at maintaining peace within its frontiers so as to prevent the civil society from dissolving and turning back to a warlike state of nature. Since the biggest threat to peace is internal disorder, modern political philosophers all saw that a strong government that has the means to control the people was necessary.

Yet peace is not enough to avoid civil disorder, for peaceful states will always be on the edge of domestic rebellion, as long as they do not fulfill their primary purpose, which is to let all the subjects live under decent conditions of life, their goods and life protected. Decent conditions of life indeed cannot obtain in the midst of civil war, for they require the state's minimal recognition and equal protection of individuals' fundamental liberties, such as the right to hold property, whose absence or violation would be likely to stir internal disorder. So peace goes hand in hand with entrenched basic rights, insofar as the absence of peace in civil war equates the absence of recognized freedom. Likewise, the peace that a state depriving people of freedom can achieve is a very fragile one, for liberties are so essential to individuals' lives that it is often said that to fight for one's freedom is to fight for one's life.

A sovereign power ruling above the law, such as the one portrayed by Bodin and Hobbes, could suit large-scale societies, because it could subject everyone to laws that ensure decent conditions of life and at the same time would be powerful enough to contain potential

civil wars. But the concentration of powers into a single center does away with the threat of social disorder by introducing another equally if not more dangerous threat – abusive state power or tyranny. This outcome has occurred so often that it is not necessary to give reasons showing that it is an all too real danger. Against Bodin and Hobbes, modern liberals found that limited government was necessary, if the state were to be prevented from infringing upon liberty, which is individuals' most precious good.

So civil war, on the one hand, and tyranny, on the other hand, are the twin evils that must necessarily be avoided in the running of a state, because they threaten freedom. I dub the criterion that identifies these evils and prescribes their prevention the "worst-result" principle. If civil war and tyranny are the Charybdis and Scylla of politics, the worst-result principle is the compass that helps navigating between the two. So in its general form, the worst-result principle simply states that a state should be organized so as to avoid civil war and tyranny. The question, and object of this thesis is *How?*

In this thesis, I try to elaborate the worst-result principle, by describing the sort of political organization that best avoids these two worst political results, and thereby safeguards liberty. In other words, I attempt to provide the best understanding of how to meet the principle's abstract imperative in reality, that is to define its concrete prescriptions.

I believe that the benefits of espousing a worst-result-driven approach can be universally appreciated, because the worst-result principle provides a minimal touchstone upon which everyone can agree. However, there are two ideas to which I am committed, so that whoever rejects them will probably reject my whole project as ill grounded. The first commitment is to the crucial importance and priority of safeguarding fundamental liberties. These fundamental liberties are already entrenched in the American Bill of Rights and in the constitutions of most of the European democracies, and they include, *inter alia*, freedoms of expression and association, the right to vote and to run for public office, the right to a fair

trial, the presumption of innocence.[1] The second idea is that men and women are capable of the most egregious treatment of one another, regardless of the social and political arrangements they live in, so that their ability or tendency to do the worst should be as restrained as possible.

Apart from these two grounds – liberalism and a dim conception of human nature – my arguments do not entail commitment to any particular conception of democracy or justice; but they do rule out political theories that do not give priority to individuals' liberties.[2] The worst-result principle can operate within frameworks that are highly egalitarian in their economic arrangements, or ones that are less so. Indeed, since the worst-result principle only concerns the design of the state, it does not imply any determinate economic arrangements, and thus does not preclude the political community from committing itself to a robustly defined conception of justice and rights.[3] Likewise, when it comes to decisions concerning social practices and policies, the worst-result principle does not translate into any particular approach such as negative utilitarianism, as one might think.[4]

In the course of this thesis, I explore different understandings of the worst-result principle, which all share the liberal overarching goal of safeguarding liberty: the political philosophies of the Baron de Montesquieu, Judith N. Shklar and Roberto Unger. These

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[1] I do not deal, in this thesis, with the question of basic economic rights that may be required to provide substantial access to the other liberties because I need not to take position on the issue for my argument's scope (see footnote 3 in this page). The list of fundamental liberties that I give is malleable, as in my first illustration of a proto-liberal state, Montesquieu's idealized England, political liberties and economic rights are neglected. But Unger does include welfare rights in his "super-liberal" system of constitutional rights. See infra chapter III, section V.

[2] That is, my project does not address any non-liberal theories (Marxist, communitarian). Nor does it deal with anarchism, even though some anarchists claim to be putting the individual first, because my arguments presuppose an existing state and aim neither at justifying it nor at proving it illegitimate.

[3] The worst-result principle can apply to full-blown capitalist economies (e.g., the U.S.) as well as to economies with socialist features (e.g., France), as long as these economic arrangements belong to liberal states. Likewise, the state may provide its citizens with substantial basic economic rights (e.g., Scandinavia's universal welfare system) or inexistent ones (e.g., Montesquieu's idealized England), the worst-result criterion still applies to all.

[4] Karl Popper's device of "piecemeal social engineering" can undoubtedly be formulated in terms of a worst-result-driven approach, insofar as it aims at rectifying the acknowledged social ills, in lieu of aiming at imposing some preconceived idea of the 'good' upon society. But Popper's open society piecemeal social engineering is essentially about social planning, while the worst-result principle merely guides political organization.

different theories inform my own understanding of the worst-result principle, which aims at protecting freedom, identifies its threats, and attempts to design the fittest sort of institutional scheme for this preventive task. I suggest that Western states have successfully avoided the Charybdis of civil war, but seem to constantly be facing the Scylla of tyrannical abuses of power. I argue that the worst-result principle calls for both a democratically active citizenry and an independent judiciary with checking powers to prevent abuses of power.

In the first chapter, I reconstruct Montesquieu's classic definition of limited government in *The Spirit of the Laws*. Montesquieu's crucial insight concerned the importance of the division of sovereignty and a system of checks and balances for preventing the abuse of state power; but he neglected the role of an independent judiciary with the power to check the other branches' conduct.

In the second chapter, I consider Judith Shklar's "Liberalism of Fear," according to which limited government is not sufficient to safeguard liberty. In her view, the worst-result principle demands constant control of the abuses of power by individual agents of government, but Shklar's unelaborated argument leaves open the question of how this control is supposed to operate. Her conception of the role of the judiciary, explicated in *Legalism*, suffers from flaws that make it unsatisfying.

Chapter III examines Roberto Unger's argument against the rigidity of the traditional liberal model, and in favor of a flexible state that relies on and encourages citizen involvement as a strategy against abuses of power. His emphasis on the importance of an active citizenry goes hand in hand with a deflation of the role of the judiciary to check violations of individuals' basic rights.

In the last chapter, I focus on wartimes as periods when the state seems to head right toward the Scylla of tyranny, in its eagerness to preserve national security, thereby placing civil liberty in great danger. I utilize the example of the Japanese Internment cases to illustrate

the different branches' conduct, and I argue that an independent judiciary is a key safeguard against violations of freedom. Hence I conclude that the most reliable arrangements to meet the worst-result principle include encouragements to citizens to participate in public matters, yet do not deflate the crucial role of the judiciary, which is the real-world compass for navigating between the Charybdis and Scylla of politics.

Chapter I: Montesquieu – Power vs. Power

In this chapter, I examine Montesquieu's political philosophy and understanding of the worst-result principle. Montesquieu is one of the fathers of liberalism, as he theorized, contra the concentration of power, its distribution into various branches. Unlike Locke's, Montesquieu's liberalism does not aim at a just society, conforming to natural law. Montesquieu is a moral and political relativist, who believes that there are multiple goods, relative to each society, and none upon which everyone can agree, so that no conception of justice can rally unanimity.

Yet, as I shall show in the first section, although there is no absolute good to pursue, there is an absolute evil to avoid: despotic government, and the fear it brings about. The separation of powers is the institutional solution that Montesquieu provides to avoid this evil, guiding the state away from the Scylla of tyranny.

In the second section, I focus on the role of the judiciary within the distribution of powers. For Montesquieu, the courts' duty does not include judicial review of the other branches' conduct.

I. The Worst Evil

1. Despotic Fear

The Spirit of the Laws offers an alternative to the traditional taxonomy of governments, based on who is invested with the power: one person, an elite, or the people. For Montesquieu, more fundamental than who has power is whether that power is exercised in a moderate or despotic way. Thus the distinction between moderate and despotic governments

is one that concerns the modality of the exercise of power. Republics, whether democratic or aristocratic, as well as monarchies, are moderate insofar as one or many govern "by fixed and established laws,"[5] however imperfect these latter may be. Despotism, on the contrary, defined by the absence of law, consists of the arbitrary ruling of one man alone, according to his own whims.

The absence of a rule of law turns despotism into a deadly machine, depoliticized and dehumanized, which operates on the basis of the people's fear. Montesquieu depicts the subject of a despotic state as "a creature that obeys a creature that wants."[6] *La crainte* is identified as the people's predominant passion that motivates their obedience to the despotic state, just as *la vertu* and *l'honneur* motivate the people's obedience in republics and in monarchies. The despotic fear utilized to maintain domination annihilates the subjects' deliberative capacities, since "the nature of the government requires extreme obedience, and the prince's will, once known, should produce its effect as infallibly as does one ball thrown against another."[7] Despotic states, thereby, only acknowledge men and women as physical beings and deny the other facet of their dual nature – human intelligence and freedom. Although despotism really exists in the world (Turkey and Japan in Montesquieu's time, North Korea today), it is scarcely a form of government, since it is characterized by the negation of a fixed system of law and the denial of its own members' humanity. In Montesquieu's theory, the concept of despotism is utilized to represent a threat of all governments, the limit beyond which the political aspect of the state is dissolved and fearfulness prevails – just as the state of nature is apolitic and dominated by fear.

Freedom in the state, or political liberty, is hence defined in opposition to a condition characterized by despotic fear:

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[5] Montesquieu (1979), book II, chapter 1. I offer my own translation of *The Spirit of the Laws*.
[6] Ibid., III, 10.
[7] Ibid.

> The political liberty in the citizen is that tranquility of mind which arises from the opinion each one has of his security; and in order to have this liberty, it is requisite the government be such that one citizen need not fear another.[8]

The fear of the despot affects the relations between the subjects, for no one is to be trusted in a state without fixed laws, prepared to punish "thoughtcrime," as Orwell calls dissenting thought in *1984*. Political freedom consists of the citizen's sense of her own safety, and for this feeling to arise and persist, there must be real safety. Against Bodin, Machiavelli and Hobbes, who recommend the prince's reliance on fear to ensure the people's obedience in a peaceful state, Montesquieu holds that safety can only be secured by means of excluding fear.[9] Citizens will feel safe if but only if they live under a fixed system of law, in which they have the right to do everything the laws permit, and can depend on government to protect their fundamental liberties.[10] Thus moderate governments can be placed along a spectrum: at one end are states with established laws that do not protect fundamental liberties and may rely on some fear, such as Spain, and at the other end are states with a rule of law *and* fundamental protections, such as England. The difference lies in the degree to which the political organization aims at safeguarding the people's freedom, and thus the degree of vulnerability to despotism.

For Montesquieu, the despotic modality of the exercise of power constitutes the worst outcome that could befall a state.

> It is not a drawback when the state passes from moderate government to moderate government, as from republic to monarchy or from monarchy to republic: but when it *falls and precipitates from moderate government to despotism*. Most peoples of Europe are still governed by mores. But if, by a long *abuse of power*; if, by a great conquest, despotism became established at a certain degree, neither mores nor

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[8] Ibid., XI, 6.

[9] Machiavelli (1995). Machiavelli writes in chapter 17 of *The Prince*, that "a ruler ought not to mind the disgrace of being called cruel, if he keeps his subjects peaceful and law-abiding." For Machiavelli, if the prince must choose between being feared or being loved, he ought to be feared, because "men are less nervous of offending someone who makes himself loveable than someone who makes himself frightening. For love attaches men by ties of obligation, which, since men are wicked, they break whenever their interests are at stake. But fear restrains men because they are afraid of punishment, and this fear never leaves them." (pp. 51-3)

[10] Montesquieu (1979), XI, 3. These fundamental liberties are not detailed by Montesquieu, but we can infer from what he says that the right for property and security of one's goods, the freedom of thought and speech, the right for due process of law, are encompassed. The right to vote is not required, since constitutional monarchy is a suitable government for protecting liberties, according to Montesquieu.

> climate would matter, and in this fine part of the world, human nature would suffer, at least for a while, the insults made in the other three [viz. Asia, Africa, America].[11]

States must aim at avoiding this absolute political evil. Montesquieu's worst-result-driven approach thus attempts to design the means required to prevent despotism from ever happening. In other words, his political philosophy rests on the principle that, in an overall political design, the primary goal is to minimize the chances that political power will be abused and political liberty violated.

> Political liberty is to be met with only in moderate governments: yet even in these it is not always met with. It is there only when there is no abuse of power: but it is eternal experience that every man who has some power tends to abuse it; he goes on until he finds limits. (…) To prevent the abuse of power, it is necessary that, by the very disposition of things, power check power.[12]

Moderate governments need adequate safeguards against potential collapse into despotism. All governments are vulnerable to abusive power, insofar as human beings are fallible, subjects to error and passions.[13] The worst-result principle entails the minimization of the government's vulnerability to degeneration into despotism, accomplished by means of certain political arrangements.

2. The Distribution of Powers

Montesquieu argues that sovereign power must be divided into different bodies that mutually restrain one another. He analyzes how each type of government can realize the division; but the most explicit description of the institutional set-up is given in his analysis of monarchy. "Intermediate, subordinate, and dependent powers"[14] which, in the case of monarchy, refer to different social classes with divergent interests (e.g. clergy, nobility, magistrates), help ensure that the prince abide with the rule of law. However, social division and conflicts of interests, although they may bring about a stable equilibrium, are insufficient

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[11] Ibid., VIII, 8. Emphases added.
[12] Ibid., XI, 4.
[13] Ibid., I, 1. "As an intelligent being," man "is subject to ignorance and error; (…) as a feeling creature, he falls subject to a thousand passions."
[14] Ibid., II, 4.

by themselves to safeguard the citizen's freedom from abuse of power. This freedom entails a specific division of the sovereign power:

> Everything would be lost if the same man, or the same body of men, were to possess these three powers: that of enacting laws, that of executing them, and that of punishing crimes or determining the disputes that arise between particulars.[15]

"Everything," here, stands for political liberty. The tripartite distribution of power into three branches – executive, legislative and judiciary – is the necessary and sufficient condition for minimizing the chances of a fall into despotism and ensuring political liberty.

Montesquieu does not conceptualize any strict separation of powers, but rather their distribution into various branches which can interfere with each other. He describes at length how it is those techniques of checks that efficiently prevent abuses of power from all branches, and so protect liberty. According to Montesquieu, since "among the three powers of which we have spoken, that of judging is, in some fashion, null, there remain only two."[16] But the legislative branch being bicameral, composed of the House of Lords and the House of Commons, the tripartite division really occurs between the executive power and the two parts of the legislative branch.

> Here, therefore, is the fundamental constitution of the government of which we are speaking. As its legislative body is composed of two parts, the one will be chained to the other by their reciprocal faculty of vetoing. The two will be bound by the executive power, which will itself be bound by the legislative power.[17]

Because the people and the Lords have different interests that they are mainly concerned with defending,[18] their reciprocal faculty of vetoing laws is an efficient mechanism of containment, relying on the equilibrium naturally brought about by conflicting interests.

Furthermore, the legislative and the executive powers, although exercised by different branches, bind each other. In Montesquieu's idealized England, the model of a free state, the legislative function is not exclusive to the parliament, since the monarch has a right to veto

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[15] Ibid., XI, 6.
[16] Ibid.
[17] Ibid.
[18] For Montesquieu, while the House of Commons, in the legislative branch, has a power proportionate to the quantitative importance of who they represent – the people, the Lords have a power proportionate to the qualitative importance of the nobles in society.

laws enacted by the parliament; parliament, in turn, controls the executive action of the government. Within such an institutional arrangement, each branch is invested with a determined power, and any branch that goes beyond its proper sphere is reliably stopped by the other branches. Montesquieu seems to have designed, in the form of the system of checks and balances, a well-oiled machine that efficiently protects political liberty.

But Montesquieu insists that the judiciary be totally independent from the other branches.

> Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power [case 1], the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power [case 2], the judge could have the force of an oppressor.[19]

There is no real instance of judiciary being combined with either legislative or executive; but it is not rare to find the three powers united in the same hands, as in Turkey and Italian republics. In case 1, the citizen's life and property is subject to the arbitrary rule of the judge/legislator, who can make ad hoc laws against the accused. In case 2, citizens are subject to the executive's particular will, which informs the power of judging: this infamous combination of whim and coercive force in the executive hands "can destroy each citizen by using its particular wills."[20] The independence of the judiciary is therefore the necessary 'golden mean' between the two extremes of arbitrariness and oppression.

II. The Role of the Judiciary

The legacy of Montesquieu's political theory is well known. Montesquieu is the author the most quoted in the *Federalist Papers* and the surrounding debates on the founding of the United States. Shklar has shown that Jefferson and Madison were operating within

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[19] Ibid.
[20] Ibid. Emphasis added.

Montesquieu's framework, starting with the necessity of having built-in defenses against potential tyranny.[21] In an essay entitled "Political Theory and the Rule of Law," Shklar even attributes to Montesquieu the authorship of the liberal model of the Rule of Law, understood as "those institutional restraints that prevent governmental agents from oppressing the rest of society."[22]

Like most commentators, Shklar considers that Montesquieu's essential contribution to political theory is his emphasis on the importance of an independent judiciary to ensure that the rule of law is respected, and to generate the citizen's feeling of her own safety.

> The Rule of Law is meant to put a fence around the innocent citizen so that she may feel secure in these and all other legal activities [i.e. religion, sex and expressions of public opinion]. That implies that public officials will be hampered by judicial agents from interfering in these volatile and intensely personal forms of conduct.[23]

This common reading of *The Spirit of the Laws* as prescribing the judiciary's eye on the executive conduct is, however, inaccurate; and it is all the less understandable since Montesquieu explicitly says that the judicial branch is "invisible and null."[24] In the following pages, I shall thus explicate his conception of the separation of powers and the role of the judiciary in this separation.

I argue that (1) Montesquieu's conception of the judiciary is only intelligible in his project of reforming the current criminal law system: (2) in order to impede arbitrariness, he emphasizes the importance of making *good* criminal laws; and (3) in order to prevent the judiciary from being a tyrannizing force in the government hands, he confers it complete independence, *not* checking powers. (4) But the judiciary is not reliable in some cases, so another institution, for Montesquieu, the House of Lords, has to be entrusted with the exercise of judicial functions; and the function of controlling the government's conduct is only

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[21] Shklar (1990).
[22] Shklar (1987), p. 22.
[23] Ibid., p. 22.
[24] Montesquieu (1979), XI, 6.

minimally foreshadowed, in the form of the Lords' "right to examine" the executive actions: apart from this control, the executive is even less bound than the legislative.

1. Excess vs. Moderation

It is impossible to understand what Montesquieu is doing without placing *The Spirit of the Laws* in the context of the Ancien Régime. Montesquieu is *not* advocating the attribution of checking powers to the "judicial magistracy," as Shklar calls it, although strictly speaking there isn't any such magistracy. Montesquieu's theory is directed against Hobbes's and Bodin's conceptions, according to which the power of judging is an essential attribute of the sovereign, who thus concentrates all three powers. His concrete target is the Ancien Régime's system of criminal law, unchanged from the medieval ages and thoroughly corrupt.

For centuries, the French judiciary, which is organized into a system of venality of offices, has provided material for comics: Molière's plays (17th century) are fraught with ridiculous lawyers and judges, ignorant and stupid, parroting the letter of the law without sense, driven by cupidity, and corrupt. Almost nowhere does Montesquieu use contemporary French examples in *The Spirit of the Laws*;[25] *a fortiori* he does not describe directly the French judiciary. But the situation is not far from Venice's inquisitors and anonymous notes of accusation.[26] People can be arrested without any charge being brought against them; there is no due process of law, no presumption of innocence. The private sphere of an individual's life is regulated: religion, sex and speech are criminal categories. As a result of an arbitrary power of judging, the people are afraid and don't feel safe. Yet the subjective perception of liberty can only arise from the citizen's perception of her own safety in a society with a fair

[25] It is for Montesquieu a mere matter of self-protection against the powerful censorship authority. Yet Montesquieu did not fool anybody and *The Spirit of the Laws* was put on the *Index* in 1751 in spite of Montesquieu's *Defense of the Spirit of the Laws* before the Sorbonne censors.

[26] Ibid. In the aristocratic republic of Venice, between 16th and 18th centuries, people could throw letters of accusation into the lion's mouth, a famous stone sculpted façade. Casanova tells in his memoirs how he was the victim of one of those: he was imprisoned without any charge brought against him simply because he shocked mores. In France, the *lettres de cachet* are secret letters used by the king or his ministers to imprison individuals without trial.

criminal system: for Montesquieu, "the citizen's liberty depends principally on the goodness of the criminal laws."[27] In order for the government to be moderate, that is safe from potential collapse into despotism, citizens must be protected from unjust laws and an excessive criminalization of life.

Further, they must be protected from arbitrary use of power. The Ancien Régime embodies a degenerated form of the classical conception of power, according to which the power of judging and punishing must be in the hands of the sovereign for him to establish civil order. In Montesquieu's times, the judiciary, manipulated by the government, is actually a powerful instrument to condone the executive officials' arbitrary will. This semblance of justice concretely translates not only into an excessive criminalization of daily life, but into excessive punishments.

As Foucault writes in *Discipline and Punish*, according to classical law, any crime could be considered as a moral offense against the dignity of the sovereign. So the proper punishment is one that repairs the wrongs done to the victim, to the kingdom, and to the king himself. Every crime, in this sense, is a crime of lese-majesty: "it is not a question of correcting the guilty man but of avenging the prince,"[28] writes Montesquieu about Japan. From this perspective, no punishment can ever appear excessive, relative to the crime. Executions, such as torture on the wheel, are public, in order to mark in the subjects' minds the state's absolute authority. In the Ancien Régime, according to Foucault, "torture did not restore justice; it reactivated power." Civil liberty depends instead on inflicting moderate and proportionate penalties.

[27] Ibid., XII, 2.
[28] Ibid., VI, 13.

2. Good Criminal Laws and Civil Liberty

Montesquieu thus attempts to provide rules for a fair exercise of the power of judging and punishing. It is convenient for the exposition to draw from book XII three major principles that should govern criminal laws. The first one prescribes a qualitative homogeneity between the nature of the crime and the nature of the penalty.

> It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ends; the penalty does not ensue from the legislator's capriciousness but from the nature of the thing, and man does no violence to man.[29]

The penalty should fit the crime, for Montesquieu. This requires that criminal law clearly specifies the nature of the crimes and their corresponding penalty. Criminal laws must be precise in words (unlike vague crimes such as witchery); and they should not regulate speeches and thoughts, nor activities that are "indifferent" to society, such as violations of religious rites. The second rule prescribes an appropriate classification of crimes.[30] Chapter 4 distinguishes four sorts of crimes, according to what they run counter to: religion, mores, public tranquility, or the citizens' security. Since penalties must be drawn from the nature of the crime, only the last category of crimes must be accounted for before tribunals. Excommunication, shame and public opprobrium generally take care of the other crimes. The third principle demands a proper quantification of penalties, which should be diversified and moderate in harshness. Indeed, "Experience has shown that, in countries where penalties are gentle, the citizen's spirit is struck by them as it is elsewhere by heavy ones."[31] The penalties' deterrent power is not proportionate to their harshness, but to the public habituation. Harsh penalties suit despotic governments, which rely on the people's fear, not moderate governments, which have virtue or honor for their principle.

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[29] Ibid., XII, 4.
[30] Montesquieu uses the word "crime" in a broad way: it refers to wrongs and offenses that are not only formally sanctioned by government, but also by the church, or just the public at large. Montesquieu's project of decriminalization of private life and public expression is meant to lead to a narrow use of "crime," as strictly legal offense.
[31] Ibid., VI, 12.

Since criminal laws affect people on an everyday basis, good criminal laws are necessary for the citizens' perception of their own security. Criminal justice is so clearly related to political liberty that "It would be easy to prove that in all or nearly all the states of Europe penalties have decreased or increased in proportion as one has approached or departed from liberty."[32] The separation of the judiciary branch can thus only be understood as an element in the broader project of reforming the criminal system. What Montesquieu aims at in his defense of an independent judiciary is thus the citizen's safeguard against arbitrary and excessive punishment, for "every penalty that does not derive from necessity is tyrannical."[33] The judiciary, deadly instrument in the hands of the executive, becomes not just harmless, but truly protective of the citizens if and only if it is rendered independent. This is not going to hamper public officials to interfere in individuals' lives, but they will not do it with the help of the judiciary's powers.

3. Judicial Independence and its Exceptions

The power of judging should be attached neither to a state nor to a profession. It should not be exercised by a permanent senate, which means that there is no expertise to be claimed in the domain, but it should be formed by persons drawn from the body of the people, for the time necessary to the trial. Montesquieu is designing popular juries, not fixed tribunals. Since the office only exists for the time of the trial, no face is attached to it; the judicial magistracy is "invisible." This invisibility is supposed, in return, to ensure blind, impartial justice: "one fears the magistracy, not the magistrates."[34] It is fundamental to the administration of the power of judging that it be impersonal because it is exercised upon individuals, whereas the legislative and the executive power are not exercised upon individuals but upon general matters.

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[32] Ibid., VI, 9.
[33] Ibid., XIX, 14.
[34] Ibid., XI, 6.

Nevertheless, Montesquieu adds an important caveat to the judiciary's alleged impersonality, claiming that the accused might fear his or her judges if they are not of the same social condition as he or she is. He then introduces three exceptions to the complete independence of the judiciary, grounded on the particular interests of the accused:

1) To prevent nobles to be exposed to the people's envy, they must be judged by their peers, that is by that part of the legislative composed of nobles, the House of Lords.
2) The House of Lords is also necessary "to moderate the law in favor of the law itself by pronouncing less rigorously than the law."[35] It seems as though the Lords have the power to reduce a sentence if they find it too harsh.
3) If it happens that "a citizen, in matters of public business, might violate the rights of the people," that is: if an executive agent commits a crime violating the people's rights, then the accuser is the House of Commons, representing the people, and the judge is the House of Lords.

For reasons drawn from some sort of socio-psychology (different classes, different interests, different passions), the Lords are to be protected as well as entrusted with the administration of political justice.

Louis Althusser's *Montesquieu: History and Politics* criticizes Montesquieu as a corporatist writer, eager to defend the prerogatives of his own class. For Montesquieu, the Lords should be entrusted with the power to "regulate" and "temper" the House of Commons and the government – we shall see next what this means –, as well as to interfere with the judiciary's independence for the sake of the accused. This last function is essential insofar as it turns the Lords into judicial magistrates alike justices in the Supreme Court. Apart from the first exception to the judiciary independence – the necessity for nobles to be judged by their peers – which appears corporatist and at the same time merely pragmatic, the second and third

[35] Ibid.

caveats constitute central roles of justices. However, the attribution to the Lords of these judicial functions is not based on their expertise for instance, but on a class issue: their *not* belonging to the body of the people confers on them a detached point of view in matters that would have had the people impassioned, and this stolidity works as a substitute for the impersonality of the judiciary.

4. Lords vs. Commons, Legislative vs. Executive

Even though the executive and the legislative branches bind each other, closer scrutiny shows that they do not have reciprocal powers. Montesquieu considers that the two "visible" powers, that of enacting laws and that of applying them, "need a power whose regulations temper them."[36] Clearly, the group to which such a power would be entrusted would have more power than the other branches, since it would regulate them. For Montesquieu, the most appropriate group for exercising this power is the House of Lords.

Although the Lords practically administer political justice, through their judging officials, and may interfere with regular verdicts, I shall argue that Montesquieu does not endorse any legislative supremacy. The Lords' regulating power indeed is much narrower than one would think, and leaves a wide scope of power to the executive branch. This shall refute Althusser's picture of Montesquieu as a noble fighting for the nobles' cause. Against the traditional reading of Montesquieu, I shall further show that the executive is less bound than the legislative, for Montesquieu considers that in a moderate and free government such as his idealized England, the outcome the most likely to lead to despotism is not an executive, but a legislative tyranny.

In England, the House of Lords and the House of Commons assemble and deliberate separately, because they have separate views and interests. Even though each body is

[36] Ibid.

"chained to the other by their reciprocal faculty of vetoing," Montesquieu explicitly says that the body of the nobles should "take part in legislation only through its faculty of vetoing and not through its faculty of enacting."[37] Such a right to render null a legislation enacted by the representatives of the people aims at preventing a potential tyranny of the majority; for the people, as Montesquieu portrayed, are inclined to do violence to the nobles. The episode of the Terreur following the French Revolution won't prove him wrong. Yet clearly, if Montesquieu was to defend his class's interests, he would attribute more than a faculty of vetoing to the Lords in parliament.[38]

As far as the relations between the legislative and the executive powers go, it does not seem as though the former really regulates the latter – on the contrary. The executive has control over the parliament through its power of regulating the time of the holding and duration of legislative assemblies *and* through its right to check new pieces of legislation – which clearly gives the executive branch a huge power over the legislative. Otherwise, for Montesquieu, the legislative would be tyrannizing over the subjects of the state, as the tribunes did in Rome, and there would no longer be any liberty.

> If the executive power does not have the right to check the enterprises of the legislative body, the latter will be despotic, for it will wipe out all the other powers, since it will be able to give itself all the power it can imagine.[39]

Montesquieu immediately takes up the non-reciprocity of the legislative powers over the executive:

> But the legislative power must not have the reciprocal faculty of checking the executive power. For, as execution has the limits of its own nature, it is useless to restrict it; besides, executive power is always exercised on immediate things.

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[37] Ibid.

[38] If the House of Commons has the power to enact legislation but not the Lords, who have a faculty of vetoing, why would the Commons also have such a faculty? Does Montesquieu mean that the Commons can override the Lords' veto? Probably not, since the House of Lords is supposed to constitute the ultimate power of regulation, at least within the legislative branch; but it is a puzzling passage. I thank Christie Hartley for her penetrating remarks on this puzzle.

[39] Ibid.

The natural limits of the executive, for Montesquieu, derive from the definition of its function: the government is only entrusted with the application of the laws, which is a task less important than that of enacting laws.

Given Montesquieu's other passages which emphasize the inherent tendency of human beings to abuse power when they are invested with it, it is difficult to make sense of this passage. It must be that within the institutional arrangement designed in the chapter, there is no need for specific external checks on the government. What matters is only that the legislative and the executive power don't belong to the same hands. In Montesquieu's historical examples, despotism befalls a state in which the prince enacts unjust laws; but as long as the legislative and the executive are separated, Montesquieu assumes moderation and thus freedom guaranteed.

Once the institutional setting is implemented, the executive appears thus less dangerous than the legislative. But the constitution would not be one in which the three powers are "distributed and cast"[40] unless the executive would be bound too. So legislative power "has the right and should have the faculty to examine the manner in which the laws it has made have been executed."[41] An examination seems like a weak chain, though, and Montesquieu explicitly says that "legislative power should not have the right to check executive power," nor should it

> (…) have the power to judge the person, and consequently the conduct, of the one who executes. His person should be sacred, because, as he is necessary to the state that the legislative body does not become tyrannical, if he were accused or judged there would no longer be liberty.[42]

An examination may not lead to a procedure of impeachment as we know it in most Western liberal democracies; for Montesquieu, this would entail the disappearance of the executive's visibility and its absorption into the legislative, which would lead to an "unfree republic." For

[40] Ibid., XI, 7.
[41] Ibid., XI, 6.
[42] Ibid.

Montesquieu, legislative tyrannies, such as those that befell Ancient republics, are the most likely cause of a state's collapse into despotism.

In conclusion, Montesquieu understands the worst-result principle as applying at the outset of the political organization of the state. Montesquieu provides an institutional solution that seems to instantaneously address the worst-result prescription of preventing the state from collapsing into despotism. Indeed the separation of powers, insofar as it enhances the rule of law, is the necessary and sufficient condition for safeguarding the state from such a deadly collapse and thus protecting civil liberty.

One cannot say, however, that Montesquieu does not have any conception of an ongoing danger of abusive power, since each branch is invested with the power to interfere with the other branches. Yet Montesquieu's trust in the executive and mistrust of the legislative seems wishful thinking, and ignorant of his own psychological considerations over the human race. So his understanding of the worst-result criterion needs to be reworked to include more restraints on the all too real dangers posed by the government.

Further, Montesquieu neglected the importance of the judiciary and potential role in checking the other branches' conduct. His reflections on judicial independence, indeed, take place in the broader project of reforming the criminal law system. His conclusions are that good criminal laws, and the citizen's subjective perception of her liberty, imply an independent judiciary, the decriminalization of private life, fair trials and moderate penalties.

What Montesquieu aims at in his defense of an independent judiciary is thus the citizen's safeguard against arbitrary and excessive punishment, which requires the guarantee of due process of law and the presumption of innocence. It is thus true that an independent judiciary which would strictly apply just criminal laws is necessary to prevent executive

abuse, but it is true only in the procedural sense of providing the accused with a fair trial and protecting the criminal from excessive punishment.

Chapter II: Judith Shklar – The Government vs. the Individual

At the inception of liberalism, Montesquieu provided an institutional solution to the problem of abusive state power: a system of checks and balances and limited government to prevent the state's collapse into tyranny. Shklar convincingly argues that the traditional liberal solution is insufficient to ensure the protection of individual liberties. In this chapter, I explicate her understanding of the worst-result principle.

The first section lays out her identification of the worst political evil – governmental brutality and the fear it inspires – and the demand to prevent it. The second section further illustrates and conceptualizes this evil, focusing on wartime abuses and Shklar's minimalist prescription to do 'damage control'. The third section indicates the conditions required to meet the worst-result principle's prescriptions – a democratic liberal society with multiple politically active groups and accessible, fair courts of law. But Shklar does not elaborate enough on the extent to which these arrangements are reliable in controlling executive abuses of power. Since the judiciary, rather than an active citizenry, is currently the protector of basic rights, I finally examine Shklar's conception and critique of the judiciary.

I. Cruelty and Fear

Shklar's liberalism of fear draws heavily on historical memory, which instructs us that pervasive and profound fear of one's political rulers and their officials is the worst political evil, the *summum malum* with which to begin: "That evil is cruelty and the fear it inspires, and the very fear of fear itself."[43] Following Montesquieu, who found that civil liberty and fear were mutually exclusive, Shklar conceives of systematic fear as the very "condition that

[43] Shklar (1989), p. 11.

makes freedom impossible, and it is aroused by the expectation of institutionalized cruelty as by nothing else."[44] Immediate memory reminds us about the overwhelming presence of fear in the bloodshed of Nazism and Communism, which systematized violence. So Shklar, like Montesquieu, understands the worst-result principle as aiming at freedom from fear by means of the establishment of the rule of law to defend against governmental cruelty.

However, Shklar's worst-result-driven approach is different from Montesquieu's insofar as she insists that the difference between totalitarianism and liberal democracies is only a matter of degree within the spectrum of "institutionalized violence."[45] Shklar is attentive to the gradations of fear and public cruelty, for the liberalism of fear "regards abuses of public powers in all regimes with equal trepidation."[46] The state claiming "the monopoly on the legitimate use of physical force," as Weber famously puts it, a minimal degree of fear – the threat of repression and punishment – is necessarily implied in any system of law. Consequently, Shklar insists that the rule of law and the system of checks and balances, are "not a sufficient condition" for freedom, as they are for Montesquieu, they are "a necessary prerequisite"[47] only. Avoiding the worst further requires that the state's exercise of coercion "be controlled in its scope and modified by legally enforced rules of fairness, so that arbitrariness not be added to the minimum of fear required for law enforcement."[48]

Shklar understands the worst-result principle not only as aiming at the general political structure but also as oriented toward individuals. Where Montesquieu focuses on the despotic state's nature at a macro-level (arbitrary ruling of the despot/the people's fear), Shklar is attentive to micro-levels, that is, particular acts of cruelty and the consequent fear of individuals. In her understanding, the worst-result criterion prescribes the prevention of the fear "created by arbitrary, unexpected, unnecessary, and unlicensed acts of force and by

[44] Ibid., p. 11.
[45] Ibid., p. 10.
[46] Ibid.,p . 9.
[47] Ibid., p. 10.
[48] Ibid., p. 12.

habitual and pervasive acts of cruelty and torture performed by military, paramilitary and police agents in any regime."[49] Indeed memory identifies the source of fear in powerful petty officials, prone to abuse their power.

> The assumption, amply justified by every page of political history, is that some agents of government will behave lawlessly and brutally in small or big ways most of the time unless they are prevented from doing so.[50]

Montesquieu's techniques of checks and balances may be reliable against the state's collapse into despotism, but they fail to prevent micro-level abuses by petty officials. Shklar's political philosophy rests on the principle that, in the running of a liberal society which operates under the rule of law and protects fundamental rights, the primary goal is to minimize the risks of local abuses of power.

II. Is Public Cruelty Sometimes Necessary?

According to Shklar, abuses of power by executive officials are made possible, and more or less usual, by the coercive power which these agents are entrusted with. The tendency of the government to degenerate into brutality, as Shklar stresses, is especially present in wartime, when its repressive power is expanded. In discussing the early Cold War period, she writes:

> With the intelligence and loyalty requirements of the national warfare states that quickly developed with the outbreak of hostilities, torture returned and has flourished on a colossal scale ever since. We say "never again," but somewhere someone is being tortured right now, and acute fear has again become the most common form of social control. To this the horror of modern warfare must be added as a reminder. The liberalism of fear is a response to these undeniable actualities, and it therefore concentrates on damage control.[51]

Since modern warfare considerably increases the risks of violations of individuals' liberties, for Shklar, the task set by the worst-result standard does not consist in 'preventing abuse of power from ever happening' as it was for Montesquieu, but in 'damage control.' Shklar does

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[49] Ibid., p. 11.
[50] Ibid., p. 10.
[51] Ibid., p. 9.

not dream of eliminating the fear created by public coercion, but merely of minimizing the occurrence of acts of cruelty, and the acute fear they engender.

It is important to note, symmetrical to the tendency of governmental agents to abuse their power are their constant attempts to make acts of cruelty pass for legitimate force, especially in wartime. Government invariably appeals to necessity to justify constitutional violations and claims that the state's safety could not be obtained otherwise.

I shall call this proclivity of executive officials to violate fundamental rights on behalf of national security "The Jack Bauer Syndrome," in reference to the protagonist of the TV show *24*, in which it is constantly shown that the 'protocols' imposed upon CTU (Counter Terrorist Unit) are burdensome, time-consuming, bureaucratic formalities that hinder the effort of preventing terrorist attacks. With the passing seasons of the show, Jack Bauer realized that one cannot play by the rules if one is to protect the safety of the President (season 1) and of the population (seasons 2-5) against this new kind of enemy which terrorists are. As the bomb that threatens hundreds of thousands of innocent lives is ticking (sic.), there is no time for doing the "paper work," e.g. bringing charges against someone to justify custody. And in these "supreme emergency" circumstances, as Walzer might say, torture appears as the only available and effective means to gather information and save the country, and is thereby amply legitimized. The Jack Bauer Syndrome especially refers to executive agents (police, military, paramilitary, intelligence agencies, etc.) inflicting physical and psychological pain upon other individuals, on the grounds that it is necessary to achieve an important good for the nation.

The movie *A Few Good Men* illustrates the pervasiveness of the Jack Bauer Syndrome in the military. Jack Nicholson plays a Marine Colonel who is the commander of the U.S. base in Cuba, at Guantanamo Bay. In the climactic scene of the movie, Nicholson is pressed by Tom Cruise to explain how a certain weak soldier under Nicholson's command, Santiago,

was beaten to death by his own fellow Marines: "You want answers?" shouts Nicholson. "You want answers?" "I want the truth" retorts Cruise. "You can't handle the truth," says Nicholson.

> Son, we live in a world that has walls and those walls have to be guarded by men with guns. Who's gonna do it? You? You, Lieutenant Weinberg? I have a greater responsibility than you can possibly fathom. You weep for Santiago and you curse the Marines. You have that luxury. You have the luxury of not knowing what I know – that Santiago's death, while tragic, probably saved lives. And my existence, while grotesque to you saves lives. You don't want the truth because deep down in places you don't talk about at parties, you want me on that wall. You need me on that wall.

Nicholson's character emphasizes the Necessity behind the Jack Bauer Syndrome, a necessity supposedly unfathomable and deliberately ignored by liberals. His metaphor about the walls indicates two important elements: 1) the military mission is to protect the fortress of Western democracy and civil liberty[52]; 2) what happens outside the walls cannot be judged by the criteria that apply within. Appealing to a higher necessity is an attempt to rationalize, if not legitimize, occasional or regular acts of cruelty and violations of basic rights.

Today's reality too, nearly five years since the War on Terror began, may offer a tragic illustration of executive abuse of power, especially prisoner abuse by military officials. It has been recently alleged that certain torture practices were performed as "stress relief" for soldiers, *not* for the direct purpose of gathering information.[53] It appears that the soldiers indicted for abusive handling of detainees in Abu Ghraib were crossing such boundaries, as even the military and the administration acknowledge. However, I shall not consider the "stress relief" torture practices as a notable different kind of abusive power. Indeed, the "stress relief" use of torture is not different in nature, but only in degree, from the Jack Bauer Syndrome, which does not exclude the possibility of retaliation impulses being intermingled with genuine concern for the national security. Jack Bauer himself does not always display

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[52] Nicholson's metaphor may be interpreted strictly historically by reference to the Iron Curtain and the division of Western and Communist blocs during the Cold War.

[53] See for instance the article "Torture of Iraqis was for 'stress relief', say US soldiers" in *Sunday Herald*, October 2, 2005.

"pure" intentions, as in season 3, when he had to defuse the terrorist plans of Nina Myers, who killed his wife in the first season of the show.

Indeed, it is worth noting that the executive systematically attempts, not only to rationalize, but really to justify "cruel, inhuman and degrading" treatment of the detainees – banned by the Convention Against Torture ratified by the U.S. in 1994 – as necessary for the common good. A *Newsweek* article on torture read:

> According to a Southern Command report that came out earlier this year [2005], al-Qatani [alleged 20th highjacker who had been refused entry to the U.S. before 9/11] was forced to perform dog tricks on a leash, was straddled by a female interrogator, told that his mother and sister were whores, forced to wear a woman's bra and thong on his head during interrogation, forced to dance with a male interrogator and subjected to an unmuzzled dog to scare him. At congressional hearings last July, Southern Command's Gen. Bantz Craddock testified that the formerly defiant al-Qatani had "provided insights" into al-Qaeda's planning for 9/11.[54]

Because al-Qatani, trained in resistance, was not responding to the usual interrogation techniques, his handlers had obtained permission from Defense Secretary Donald Rumsfeld to try new techniques. Micro-level acts of cruelty are authorized by the White House for the sake of national security and on the grounds that, as Rumsfeld said in 2002, "Al-Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to prisoner-of-war status for purposes of the Geneva Convention of 1949."[55] Prisoners are now called PUC, persons under control; they are not subject to the *jus in bello* in their handling and they are denied due process and judicial review in their trials by military commissions.[56]

From the alleged handling of the detainees in U.S. camps in Iraq, Afghanistan, Cuba, to the recent domestic spying program to which the administration publicly admitted, some have raised serious questions as to how far the executive branch can go. In "After 9/11," Michael Walzer rebuts these questions, offering a moral justification to the Jack Bauer

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[54] In "The Debate over Torture" in *Newsweek*, November 21, 2005, p. 31.
[55] Quoted in "The Debate over Torture" in *Newsweek*, November 21, 2005.
[56] See *United States Senate Committee on the Judiciary Testimony of Scott L. Silliman on DOJ Oversight: Preserving our Freedoms while Defending Against Terrorism*, Wednesday, November 28, 2001. Scott L. Silliman, is Executive Director of the Center on Law, Ethics and National Security at the Duke University Law School. See also the ACLU *Safe* and *Free* campaign and its recent involvement in *Hamdan v. Rumsfeld*: "ACLU Urges Supreme Court to Declare Guantanamo Bay Military Commissions Illegal," March 28, 2006, available online at www.aclu.org.

Syndrome that echoes Nicholson's plea, as he claims that violations of fundamental rights 1) are grounded on military necessity, and 2) ultimately aim at protecting those basic rights. He adds that whoever does not agree (i.e., liberals) has to make the case that respect of fundamental liberties can be reconciled with military efficiency.

> If we can't make that case, then we have to be ready to consider modifying the constraints. It isn't a betrayal of liberal or American values to do that; it is in fact the right thing to do, because the first obligation of the state is to protect the lives of its citizens (that's what states are for), and American lives are now visibly and certainly at risk. Again, prevention is crucial. Think of what will happen to our civil liberties if there are more successful terrorist attacks.[57]

This sort of rhetoric is exactly what Shklar warns us against. In liberal democracies, the burden of proof is neither on the protector nor on the violator of civil liberty, because fundamental rights are not modifiable according to the situation. They are entrenched in the Constitution.

This does not entail any dilemma between preventing terrorism at the expense of liberty, and protecting civil liberty at the expense of the fight against terrorism: we can be both *safe* and *free* as the American Civil Liberties Union campaign puts it. The liberal mechanisms of safeguard against violations of basic rights accommodate room for an efficient war effort.

For instance, the Foreign Intelligence Surveillance Act enacted by Congress and the President in 1978, comprehensively regulates electronic surveillance within the U.S., striking a careful balance between protecting civil liberties and preserving the "vitally important government purpose" of obtaining valuable intelligence in order to safeguard national security. With minor exceptions, FISA authorizes electronic surveillance only upon certain specified showings, and only if approved by a court.[58] The statute specifically allows for warrantless wartime domestic electronic surveillance – but only for the first fifteen days of a war.[59] So it is far from clear that the 'protocols' imposed upon intelligence agencies hinder

[57] Walzer (2004), p. 139.
[58] S. Rep. No. 95-604, pt. 1, at 9 (1977)
[59] 50 U.S.C. § 1811.

the war effort, as the White House officials claim; rather, it is plausible to suggest that the Bush's administration National Security Agency domestic spying program could have been conducted effectively without infringing on basic individuals' liberties.[60]

Likewise, it seems far from being a matter of dire necessity that the suspects in the war on terror be denied the status of POW, and tried by military commissions which deny them due process and judicial review. One cannot deny that some abuse of civil liberty may be justified for national security; the problem is that the executive has a proclivity to abuse this excuse to justify unnecessary encroachments upon liberty. The task of damage control is a constant and endless effort that is especially urgent in wartime, when civil liberty is most at risk.

III. Meeting the Worst-Result Norm's Prescriptions

What institutional set-up will best meet the worst-result principle that requires limited government and the control of unequally divided power? Shklar argues that it can only be obtained within "the institutions of a pluralist order with multiple centers of power and institutionalized rights."[61] Shklar insists indeed on the division and subdivision of power at the level of the structure: limited government and a system of checks and balances are necessary against the concentration of power in too few hands. Further, a liberal society is one with an entrenched system of rights, as defined by the Constitution. A liberal political society is one committed to protecting fundamental liberties and observing the rule of law.

Shklar insists that the rule of law is the "prime instrument to restrain governments"[62] and thereby to protect constitutional rights.

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[60] For more details on the FISA and its violations by the NSA domestic spying program, see "On NSA Spying: A Letter to Congress," (2006).
[61] Shklar (1989), p. 19.
[62] Ibid., p. 18.

> One half of the Bill of Rights is about fair trials and the protection of the accused in criminal trials. For it is in court that the citizen meets the might of the state, and it is not an equal contest. Without well-defined procedures, honest judges, opportunities for counsel and for appeals, no one has a chance.[63]

Like Montesquieu in *The Spirit of the Laws*, Shklar is mainly concerned, here, with ensuring the accused fair criminal trials. She underlines the importance of a politically independent and impartial judiciary, a strictly defined procedural system of rights that starts with the presumption of innocence until one is proven guilty and that allows for counsel and appeals, a moderate criminalization of life – "Nor should we allow more acts to be criminalized than is necessary for mutual safety"[64] – as well as the effort to legally compensate the victim of a crime, rather than to just punish the criminal. Judicial independence, the pivot of the rule of law, guarantees that individuals be fairly treated in courts of law, which is fundamental for the subjective perception of one's safety, as Montesquieu stressed, and is thus essential for the individuals' real liberty.

For the worst-result principle to be met, not only need the society be a liberal one, committed to the protection of fundamental rights and having built-in defenses against tyranny, but, Shklar adds, "The society is also of necessity a democratic one, because without enough equality of power to protect and assert one's rights, freedom is but a hope."[65] Without the institutions of representative democracy that ensure political pluralism and equal power among citizens, through the right to vote, civil liberty is jeopardized. "Liberalism," Shklar concludes, "is monogamously, faithfully, and permanently married to democracy – but it is a marriage of convenience."[66] Democracy is favored because it is the most reliable political structure to safeguard civil freedoms and prevent tyranny.

Shklar insists that the division and subdivision of power needs to be realized throughout all strata of society, not just at the macro-level of the political structure. So within

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[63] Ibid.
[64] Ibid., p. 18
[65] Ibid.
[66] Ibid.

the democratic set-up, she emphasizes the role of voluntary, non-governmental organizations in controlling executive conduct.

> The importance of voluntary associations from this perspective is not the satisfaction that their members may derive from joining in cooperative endeavors, but their ability to become significant units of social power and influences that can check, or at least alter, the assertions of other organized agents, both voluntary and governmental.[67]

The liberalism of fear is not concerned with any positive conception of freedom, as self-legislation, or of human nature, as essentially sociable and creative. It only touts voluntary associations insofar as they constitute efficient defenses against abuses of power. The American Civil Liberties Union, for instance, is a precious watchdog for the safeguard of individuals' freedoms. The ACLU has proved to be a crucial source of information for the public (cf. their being the first to release government authentication of Abu Ghraib abuse images), a great force of pressure to achieve procedural justice (cf. their urging Supreme Court to declare Guantanamo Bay military commissions illegal), and a powerful resource for individuals who claim that their liberty has been violated (cf. their filing friend-of-the-court briefs for major Supreme Court cases, from *Korematsu* to *Hamdan*). For Shklar, in the absence of a multiplicity of politically active groups, freedom is in jeopardy.

This emphasis on the role played by individuals leads Shklar to demanding good systems of education and information.

> If citizens are to act individually and in associations, especially in a democracy, to protest and block any sign of governmental illegality and abuse, they must have a fair share of moral courage, self-reliance, and stubbornness to assert themselves effectively. To foster well-informed and self-directed adults must be the aim of every effort to educate the citizens of a liberal society.[68]

Here again, Shklar does not ask for education and information because these are values in and by themselves, but only because they are reliable means to preventing tyranny. Education and information are central to the shaping of a liberal citizenry, willing to stand up for the protection of their rights against governmental illegality. Responsible and well-informed liberal citizens are likely to be very efficient safeguards against executive abuses.

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[67] Ibid., p. 12.
[68] Ibid., p. 15.

In her essay, Shklar offers very unelaborated argumentation, which consists more in pointing at directions than in spelling out the exact conditions that need to be satisfied for the worst-result principle to be met. For even though she understands that the classic liberal solution to the threat of tyranny, of the sort Montesquieu provided, is not sufficient to prevent localized abuses of power, she does not work out the internal mechanisms that will realize the task of damage control. Nevertheless, one gets the gist of the argument: the dispersion of political power in a liberal democratic society respecting the rule of law, with, in particular, 1) judicial independence, and 2) the encouragement of a liberal active citizenry.

Shklar elaborates on neither of these two elements, but since the judiciary is the current protector of fundamental liberties, it is important to turn to her conception of the role of courts.

IV. Is the Judiciary an Effective Protector of Liberty?

Shklar does not elaborate beyond the importance of a guarantee of fairness in criminal trials. But the judiciary is really fundamental because it reviews, and may check, legislative and executive acts and allows individuals to initiate claims of violations of their constitutional rights. This aspect of the judiciary is really what allows it to perform the task of damage control and the protection of fundamental liberties. Nevertheless, Shklar points to the frequent unreliability of the judiciary in accomplishing this task.

In the following pages, I lay out Shklar's critique of the judiciary. The first part consists in Shklar's comments on actual historical cases that illustrate the judiciary's failure to uphold fundamental liberties. In the second part, I explicate Shklar's description of *legalism*, the dominant style of judicial decision-making, and her denial of the political independence of

the judiciary. The third part focuses on a particular nefarious effect of legalism – the denigration of politics. Finally, I shall show that Shklar's argument appears self-contradicting.

1. The judiciary's record

State officials tend to give such weight to national security that they are often prepared to violate liberties if they deem it necessary. Violations of civil liberty may indeed appear as the least of two evils in the context of war or the threat of war, when special circumstances may allow the government to temporarily suspend individuals' rights. The Jack Bauer Syndrome, as I called it earlier, i.e., the proclivity of executive officials to violate basic rights on behalf of national safety, is especially pervasive in wartime.

In such a conflict, the judiciary is supposed to stand on the side of the individual, since its function is to uphold the system of rights. But it often ends up, in times of war especially, on the side of the government, for the sake of the state's preservation. For Shklar, there is rarely a legitimate excuse for the denial of people's basic rights, so that the Jack Bauer Syndrome really amounts to the symptom of a corrupt system, that has fallen into criminality.

> What happens when legally created expectations, based on a public and published system of rights and duties, are cast aside in this way? The excuse is usually that these regrettable measures were a matter of dire necessity. In fact, they rarely are. In retrospect there are few cases of governmental criminality that can be justified on grounds of unavoidable necessity.[69]

Shklar is especially interested, in her essay entitled "Obligation, Loyalty, Exile," in the effects of official illegality on individual citizens. She shows that in the case of the interment of Americans of Japanese ancestry during World War II, the U.S. ignored the legal expectations that the Constitution ensures them, thereby violating their trust, in her view, and dissolving their bonds of obligation to the state. This official betrayal should have been prevented by the judiciary; instead, the Supreme Court failed to uphold the Constitution.

[69] Shklar (1993), pp. 47-8. Shklar is referring specifically to cases of unjust exile or exclusion from citizenship; but her point can be generalized.

In other cases, the Supreme Court may fail to protect individual rights in order to satisfy public expectations. In an early text, written during the Cold War, Shklar analyzes the *Dennis* cases, which were political trials – not criminal, she insists – of communists. Ignoring the First Amendment, the Supreme Court bowed before Congress and the public and approved of the outlawing of the communist party.

> If, as this view implies, the function of the Court is not to restrain Congress, but only to legitimize its acts by providing rationalizations which allow them to be fitted into the Constitution, there is no reason to suppose that any persecutive measure should ever be regarded as unconstitutional.[70]

Shklar suggests that the reason why the Court condoned the state's politics of persecution is that the justices were subjected to the pressure of a strongly anti-communist public.

2. The politicization of the courts

Shklar's main argument is that the judiciary often fails to protect individuals' basic rights because it fails to be politically independent. What we usually take to be the courts' impartiality is for Shklar a particular sort of conservatism. Indeed, Shklar's analysis of the legalistic ethos, i.e., the general attitude of lawyers and judges as embedded in an ideology (a set of beliefs, a mindset), reveals that legalism is essentially conservative. Yet legalism does not amount to a specific class or economic interest, but to a conservative social outlook that aims at maintaining the established order rather than protecting liberty.

> In its epitome, the judicial ethos, it becomes clear that this is the conservatism of consensus. It relies on what appears already to have been established. When constitutional and social changes have become inevitable and settled, the judiciary adapts itself to the new order. (…) For the judiciary to remain uncontroversial is the mark of neutral impartiality. Adjustment is therefore its natural policy, whenever possible.[71]

Hence the court's neutrality is for Shklar nothing but a policy of adjustment to social consensus. Shklar considers this "natural policy" to be both a psychological tendency that explains, and the grounds that purportedly justify, adjudication.

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[70] Shklar (1964), p. 216.
[71] Ibid., p. 10.

Let us, for the clarity of the exposition, borrow Kuhn's terminology and talk about "normal" and "abnormal" periods in society. Normal periods would refer to times of relative social consensus (the Cold War might be one of these); and abnormal periods would be those in which no consensus prevails in society. The use of the terms "normal" and "abnormal" thus depends on the issue at stake: society may be in a normal period regarding one social issue (e.g., slavery), and in an abnormal time regarding another one (e.g., abortion). The "conservatism of consensus" specifically applies to normal times. When vast majority agrees on what the decisions should be, then judges adjust to the consensus and hold "what appears already to have been established," as Shklar puts it. According to her, the judiciary naturally seeks and adjusts to society's agreed views, and in doing so appears impartial in the eyes of the public.

Furthermore, a neutral judge's "decisions seem to be not choices but accepted necessities."[72] Whether advocates of natural law theory or legal positivism, judges' style of adjudication (Unger dubs it *rationalizing legal analysis*) consists in appearing to only be applying rules and following the inherent logic of law. "To avoid the appearance of arbitrariness is a deep inner necessity"[73] for judges indeed, since legalism conceives of law as the very antithesis of arbitrariness. But even though judges and lawyers 'normally' appear to be neutral, it is not so in abnormal periods – and abnormal periods may be the norm in our modern pluralist societies, which are split on many issues. Thus judges are often exposed and must take side in the conflict. Their decision then does appear as a matter of choice, hinging upon their particular subjectivity, and tainted with arbitrariness, as the appearance of neutrality evaporates.

Hence Shklar notes that in America, "both the nature of the issues placed before the courts and the greater scope of choices available put the judiciary inevitably into the very

[72] Ibid., p. 11.
[73] Ibid., p. 12.

midst of the great political battles of the nation."[74] Courts cannot but respond to the political context to which they are involuntarily submerged. That the judiciary is inescapably politicized is true in two senses for Shklar. First, political issues are actually presented before courts of law – Shklar merely observes this fact, while Unger, in the next chapter, offers an explanation why. Second, law and politics are actually so intertwined that judges cannot but *be* political. More generally, judges are subject to public scrutiny, like politicians are. Judges who have to take side in a conflict appear to be making political choices, and are accused of "legislating," no matter how formalistic the rationalization of the decision might be. The judiciary's involuntary politicization thus entails its appearing arbitrary and politically biased.

3. The judicialization of politics

Shklar's goal in denying the courts' political independence is to unveil the illusory belief in the separation of law and politics. Shklar comments on

> (…) the way in which such a citadel of conservative lawyerdom as the American Bar Association addresses itself to social issues. Matters are taken up one by one, in isolation from the social context and without discussion of the basic issue. Precisely because the A.B.A. regards itself as the official spokesman of the bar it must present its views in a formal manner that gives the appearance of being supra-political and almost without concrete content.[75]

In this widespread view, the judiciary is outside of and above politics, which appears arbitrary, while courts, "speakers of the law," represent order and impartial justice. Legalism is responsible for having firmly kept courts apart from the political sphere and turned "politics" into a word of scorn.

Shklar argues against the legalistic distaste for politics, as the American Bar Association officially expresses it – and as the public widely accepts. "The official program of the A.B.A.," Shklar notes, "calls for judicialization."[76] According to legalism, negotiations

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[74] Ibid.
[75] Ibid., p. 13.
[76] Ibid., p. 17.

aiming at peaceful settlements, by means of discussions and compromises, represent defeats for justice. Shklar illustrates this position by referring to the A.B.A. stand on global justice.

> (…) [the A.B.A.] has lent its support to international law, and especially to the International Court of Justice, on the ground that adjudication alone can prevent war and establish the reign of justice. Here, as in domestic politics, disputes between states are treated in isolation, apart from world politics in general. Here, too, the adjudicative process is held up as the model for government, the substitute for politics.[77]

Such a view is misleading because, according to Shklar, it assumes that the judiciary *is* an alternative to politics, when it really is not. The judiciary cannot and should not assume the function of a substitute for politics. The program of judicialization of politics, for Shklar, is doubly misguided, because it promotes something that is neither possible nor desirable. It naïvely claims that the morality of justice – the adjudicative method – is cut off from politics, when it is in its very midst, and that it is "there," objective, when it is ultimately determined by the agent's political and ideological preferences. So legalism substitutes a fictional ideal for the politics of negotiation and compromises, which properly belong to the public arena.

Hence Shklar aims to substitute a relatively realistic picture for the idealistic (yet not even desirable) separation of law and politics and thereby restores discussion and compromise as values of liberal democracy. The implications of Shklar's reassessment of the situation are not explicitly spelled out, because she is more concerned with explaining and exposing than prescribing, but they are easy to guess. Political problems should be politically resolved, on the grounds of expediency and compromise; and courts should not be addressing political issues. If that is particularly obvious in abnormal periods, it is also true of normal periods, for the mission of the judiciary is not to hold "what appears already to have been established," but to settle disputes over rights by speaking the law and to check the constitutionality of legislative enactments and executive orders. The worst-result principle requires an independent agent to ensure respect of constitutional rights, and the judiciary is the fittest branch to perform this preventive task.

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[77] Ibid., p. 18.

4. Critique of Shklar's argument

Shklar exposes the courts' political independence as a "fiction"[78] and the ideal of judicializing politics as a chimera. It is however difficult to see how one is to draw the line between 'political' and 'legal' cases, so as to address Shklar's concerns about the politicization of the judiciary and the judicialization of politics. Her argument indeed seems to display self-contradicting elements. On the one hand, she argues that the separation of law and politics is a myth.

> Thus to maintain the contrast between legal order and political chaos and to preserve the former from any taint of the latter it is not just necessary to define law out of politics; an entirely extravagant image of politics as essentially a species of war has to be maintained. Only thus can the sanctity of rule following as a social policy be kept from compromising associations.[79]

On the other hand, since Shklar's analysis is deeply hostile to the legalistic distaste of politics and to judges' and lawyers' hypocrisy about their own practices, she implicitly calls for the "return" of negotiation and expediency in politics and claims that judicial decision-making fails unless it follows uncompromising rules. Yet this two-fold prescription requires the legalistic distinction between law and politics, which Shklar rejects.

Shklar's argument against legalism is self-defeating since it consists in denouncing the separation of law and politics as a fiction and at the same time espouses it. Shklar indeed just turns the legalistic critique of politics into a praise, as she seems to agree with the legalistic qualification of politics as compromise and expediency, but touts these as values of liberal politics. And she also accepts that the norm of adjudication is rule-following, but claims that courts' decision-making does not live up to this norm in reality.

This inconsistency appears for instance in Shklar's analysis of the *Dennis* cases, as she shows how courts inevitably lend themselves to political pressures, and at the same time draws clear lines on what the Constitution really says and what courts should have done. She

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[78] Ibid., p. 217.
[79] Ibid., p. 122.

even concludes that "Nothing can be gained by abandoning the principle of legality in criminal cases, for here the strictest legalism, in its conservative function, supports and reinforces constitutional government and personal freedom."[80] For Shklar, criminal cases, but not political ones, benefit from legalism. Clearly, one needs the reintroduction of legalistic elements to make sense of her argument. Hence by rejecting legalism, Shklar renounces the possibility of finding legal criteria for distinguishing cases that should go to courts from those that should be worked out in the political arena.

In any case, Shklar's assessment of the courts' failures to uphold the Constitution in the *Dennis* cases and in the Japanese Internment cases does not lead her to infer the judiciary's unreliability and to reject the institution.

> Is there a justification for coercive elimination of political enemies – for selective domestic war? It is not the courts' involvement in such a policy that is the primary issue. (…) It is however not argued here that either persecution or political trials have been so extensive as to inspire any fear and trembling or even to impair the constitutional order decisively. There is no cause for gloom and doom.[81]

In many of her writings, she touts the American model of constitutional democracy, considering the judiciary as fundamental to protect the constitutional system of rights. An independent judiciary is a crucial element to meet the worst-result principle and ensure damage control on macro- and micro-level abuses of power.

But Shklar does introduce some reservations in the trust that citizens should place in courts. Montesquieu's goal in giving the judiciary its independence was to prevent it from becoming an instrument of oppression in the hands of government. Shklar shows us that believing that such a development won't happen in a liberal society again is wishful thinking. The political trials of communists, and the interment of Japanese-Americans illustrate how the judiciary naturally legitimizes the illegal conduct of the executive, and thereby condones the Jack Bauer Syndrome. The members of a liberal state have to remain vigilant – damage

[80] Ibid., p. 220.
[81] Ibid., p. 210.

control is a constant, surely endless task. But Shklar does not tell us what else would be needed to accomplish more reliably that task than what the judiciary in liberal systems such as the U.S. have historically done.

Chapter III: Unger – The Judiciary vs. the People

In this chapter, I examine Roberto Unger's political theory. Unger shares Shklar's concerns about legalism and the excessive powers of courts, but unlike Shklar, Unger attempts to provide a solution to this problem. He indeed sketches a framework in which the protection of fundamental liberties is not entrusted to the judiciary. His program offers a feasible alternative to the traditional liberal model, in the spirit of liberalism, as Unger claims to only be pushing "the liberal vision beyond the point to which its creators have up to now been willing to take it."[82] In his understanding, the worst-result criterion prescribes the protection of freedom, understood as one's engagement in creative activities and experiments with one's fellow citizens.

It is very helpful to explicate Unger's assessment of the current situation in liberal societies, rather than to lay out his program immediately. In the first section, I focus on Unger's analysis of the commanding role of the judge in Western constitutional democracies. This "judicial obsession," as he dubs it, is the symptom of a disease in democracy. The second section takes up the cause and effects of such a disease: it is rooted in the ignorance of the crucial duality of human nature, and it entails the failure to conceive and implement structural change. In contrast, the politics of a healthy democracy encourage popular engagement and practical experimentalism. The third section offers Unger's argument, on historical grounds, that popular engagement is crucial for safeguarding freedoms, while liberal mechanisms of containment make up a paralytic state. In the fourth section, I analyze Unger's take on the problem of complex enforcement, which in his view is central to the task of ensuring the protection of fundamental rights and liberties. This brings me back to his critique of the

[82] Unger (1987), p. 455.

judiciary, and his defense of democratic decision-makers. I offer an internal argument against Unger's deflation of the importance of the judiciary in the fifth section, as I argue that even in an empowered democracy, with a new "rigid" system of rights, the judiciary is necessary not only to settle localized disputes, but also to review legislative and executive acts on the grounds of broad holdings about the nature of rights. In the sixth and last section, I claim that Unger does not really espouse a worst-result-driven approach, as he claims to be, because his de-emphasis of the courts' role annuls a key safeguard against abuses of power. Deflating the judiciary, no; complementing it, yes.

I. The Judicial Obsession – Symptom of a Disease

Echoing Shklar's concerns about legalism and the judicialization of politics, Unger points at the "judicial obsession," that is the commanding role of the judge in Western constitutional democracies. Unger traces the history of the judge's status to remind us of their initial mission and show that modern judges have gone far beyond it, armed with the adjudicative method of rationalizing legal analysis, by means of which they make law appear as a rational system, just and legitimate, and conceal the fact that law is nothing but truce.

Early forms of government appear judicial insofar as they used to operate on the basis of dispute settlement. However, Unger notes that the most important feature of these proto-state institutions is that they worked against a background of customary law, whose effect was to place social arrangements (including social roles, standards of behavior and belief, and legal procedures) beyond the reach of challenge, so that "they become in practice the natural order of things."[83] But legal systems, viz. the common law of England and the *jus commune* of continental Europe, developed in contrast with social custom which "naturalized" society.

[83] Unger (1996), p. 108.

Jurists and societies started to conceive of their law as a product of history, a human-made artifice evolving in time.

In democratic societies, modern judges of course recognize that law is made by lawmakers, that is by non-judicial agencies.

> In a democracy, the political branches of government must count heavily among these lawmakers. Yet the power of the judges as elaborators of law seems to exceed what their occasional responsibilities as custodians of constitutionally entrenched individual rights can explain.[84]

Unger refers to the judges' actual legislative power as "incongruous" relative to their original watchdog mission. Their current activities of revising and reorganizing the law under the guise of interpreting it developed and expanded from around 1800; and judges thus "did not remain the passive slaves to the original lawmakers that many of the radical reformers and democrats of the early nineteenth century wanted them to be."[85] Unger stresses that historians have failed to explain this evolution, but goes on to offer an explanation of the riddle: representatives preferred and found it better for their political standing to transfer the task of resolving specific issues to judges. The devolution of political issues to the judiciary is hence wanted and realized by the legislature itself.

A transfer of responsibilities explains the significant, exorbitant some might say, judicial power. According to Unger, lawmaking consists in attempting to accommodate divergent groups of interests, so that a legal statute is the agreement that results from a bargain between certain groups. These arrangements between representatives of the people provide a relatively incomplete scheme: they do not specify all issues, but instead leave a lot of open questions. Lawmakers found it in their interest indeed, mainly in order to keep their electorate satisfied, to avoid resolving certain specific problems in the agreements and to pass these problems on to courts – so that the judges do the dirty job for them, so to say.

> One way to understand rationalizing legal analysis and the significant judicial power that it both grants and conceals is to say that it serves as the instrument by which the lawmaking elites in the political branches of government transfer the responsibility for completing their agreements to judges and other

[84] Ibid. Unger uses "government" in its broad sense of state, not to refer to the executive branch only.
[85] Ibid.

> professional law appliers. The ostentatious devolution of power to law appliers, through the use of vague rules and standards, is simply the extreme case of an inveterate habit.[86]

According to Unger, rationalizing legal analysis is an important tool for judges, as it allows a transfer of responsibilities and power from the legislature to the courts. This transfer results in the identification of legal reasoning with judicial decision. Since lawmakers rely on judges to complete the incomplete laws that they enacted, judges thereby appear to be justified in their lawmaking powers. Moreover, the theory of rationalizing legal analysis "conceals" judicial power under the guise of interpreting the law, as judges only claim to make patent the deep social logic of statutes of law.

Yet Unger insists that statutes of law need to be completed and interpreted because they really are nothing but "ramshackle compromises," so that there is no inner logic to ferret out.

> There is no developing rational scheme that different fragments of law may be seen to exemplify. Rather than being a problem for democracy, the absence of such a latent scheme is, in a sense, a precondition for democratic vigor, for democracy expands by opening social life up to conscious experimentation. For the same reason, the devolution of law-completing and law-reconstructive responsibility to an insulated band of experts in rational deliberation makes no sense. Such an expertise properly belongs to citizens.[87]

As Unger repeats it in a number of places, "Everything is politics." This is a descriptive claim as well as a normative one: everything *should* be politics; and so lawmaking *must* remain a political matter, belonging to the public arena, not to courts. The privilege of the judiciary reveals deep antidemocratic precommitments that have resulted in the relegation of legislation to the status of "last-ditch instrument to be used when the powers of rational deliberation fail."[88] Judicial settlement is first, while legislative and political settlements appear as inadequate means of lawmaking; as if nothing should be left to politics. Hence judicial

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[86] Ibid. Unfortunately, Unger does not give any example of such incomplete laws that have to be précised by judges. An instance is provided by Antonin Scalia, in *A Matter of Interpretation: Federal Courts and the Law*: a statute provides for an increased jail term if, "during and in relation to a drug trafficking crime," the defendant "uses a firearm." In a case presented before the Supreme Court, the defendant had exchanged an unloaded firearm for cocaine. The Court held (6-3) that the defendant was subject to the increased penalty. Scalia dissented because "the phrase 'uses a gun' fairly connoted use of a gun for what guns are normally used for, that is, as a weapon." Unger would surely say that the lawmakers needed to be more specific about what they meant by "use a firearm."

[87] Ibid., p. 109.

[88] Ibid., p. 107.

obsession is the symptom of "a democracy [caught] in the grip of antidemocratic superstition."[89] Antidemocratic forces – practical and imaginative – are clearly the worst outcome for a democracy.

II. Health and Sickness of Democracy:
Democratic Experimentalism vs. Institutional Fetishism

The disease, however, is difficult to treat because of an essential effect of the identification of legal reasoning with judicial decision, which is "to usurp the imaginative field in which more constructive and reconstructive practices of legal analysis might develop."[90] The imaginative field covers the preconceptions, conceptual tools, ideologies, and imaginative resources of a society; it basically includes *what* the society thinks and *how* it thinks about things. The fascination with judges deprives legal thought of imagining alternative – more democratic – scenarios, as if the judicialization of politics was necessary and desirable. Accordingly, Unger denounces the idea that the current scenario is the only available one and argues for the return of legal analysis to the democratic arena, in order to energize democratic politics.

The failure to imagine transformative possibility has nullified the practical experimentalism of democratic politics. Yet, as Unger insists, democracy essentially consists in the people's tinkering, in imagination and in practice, with their social and political world. Institutional imagination needs new tools, especially a "credible account of structural change,"[91] that is to say, of institutional, practical and conceptual change.

Human nature, indeed, is crucially dual, sometimes obedient to and other times rebellious against the established order. Unger qualifies this duality as "the fundamental two-

[89] Ibid., p. 110.
[90] Ibid., p. 112.
[91] Ibid., p. 3.

sidedness of our relation to the discursive and institutional worlds we inherit, remake, and inhabit: we are them, and we are more than them."[92] We sometimes take our present arrangements for granted, but we also challenge and defy them, for we long for so much more beyond the limits they impose. Unger's first argument for popular engagement is morally grounded: Unger conceives humanity as essentially creative, and human flourishing as requiring the freedom to engage in experiments with one's fellow citizens. Thus the only political regime in which men and women can flourish is a democratic one, whose politics favor the citizen's involvement in public affairs. But Unger is first interested in the imaginative and practical impediments to democratic politics, for these are what need to be overcome.

The disease of democracy is rooted in what Unger calls "institutional fetishism: the belief that abstract institutional conceptions, like political democracy, the market economy, and a free civil society, have a single natural and necessary institutional expression."[93] This belief is an enemy of democratic experimentalism, since it ignores the duality of human nature and the broad range of unrealized possibilities that the current, limited, democratic arrangements conceal. Institutional fetishism further entails the belief in the neutrality of institutional orders, and thus the denial that "To move in a certain direction of institutional change is implicitly to prefer some varieties of individual and social experience to others."[94] Since institutions are not value-neutral, the practical arrangements we inhabit – and once made – greatly influence our capabilities of imagining future alternatives: they become, so to speak, our "second nature." Unger applies the worst-result principle in a way that does not merely prescribe institutional structure, but acknowledges the influence of ideas on the world, since "We cannot separate the practical and the spiritual shape of our civilization."[95] So the

[92] Ibid., p. 5.
[93]Ibid., p. 7.
[94] Ibid., p. 18.
[95] Ibid., p. 9.

worst-result norm also prescribes the refutation of institutional fetishism as a false and dangerous belief for democracy, responsible for the evil of "antidemocratic superstition."

But Unger insists we must not forget "the secondness and therefore the revisability of our second nature."[96] For instance, the low levels of participation in political elections in the U.S. can only be attributed to chosen practical arrangements that do not favor popular engagement, not to supposed inherent features of Americans. Evidence is provided by Tocqueville's vivid picture of the citizens' active involvement in politics in 19th century America. Low levels of popular engagement manifest "de-energized politics," which is the "long-triumphant version of democratic politics in the West."[97] Its two main components, a constitutional organization making reforms depend upon consensus, and a political organization favoring the political quiescence of the people, make up what Unger dubs "the constitutionalism of deliberate deadlock," that consists in "slowing down the transformative uses of governmental power."[98] These structural features of liberal societies represent evils for democracy. According to Unger, the worst-result principle prescribes the minimization of these antidemocratic effects on the running of the state, because they ignore human duality and thwart democratic experimentalism.

III. A Historical Argument for Popular Engagement

However, one might object that liberal institutions and practices precisely intend to discourage citizen participation to the extent that it does threaten the institutional mechanisms of defense against abuses of power. The system of checks and balances, indeed, is designed in order to prevent abuses of power from the people, their representatives, and the government, and thus efficiently protect civil liberty.

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[96] Ibid., p. 19.
[97] Ibid., p. 16.
[98] Ibid.

In *What Should Legal Analysis Become?*, Unger does point at the historical development of these "mobilization-hostile arrangements" intended by early 19th century liberals "to dampen popular frenzy and to make property safe;"[99] yet he does not directly address the inadequacy of such arrangements. A more complete argument is to be found in *False Necessity*, in which he argues, on historical grounds, that popular engagement is crucial to safeguarding freedoms from governmental abuse of power. His argument is twofold. First, it consists in a general critique of the liberal division of political power and system of checks and balances which dangerously stifle the state. Second, it is programmatic: Unger argues in favor of a mass popular engagement in the political sphere, in order to facilitate structural transformation and protect civil liberty.

Analyzing the history of modern constitutional states in the 20th century, Unger reveals that the state's plasticity is a necessary condition for its safety and stability. As he studies the states' different constitutional features, Unger sorts out the energizing ones, which enhance freedom by means of supporting the state's constructive and reconstructive capabilities, from the disabling (liberal) ones, which prevent transformations and condemn the state to paralysis.

> In particular, they [i.e., liberal structures] prevent those in power from changing the formative context of power and production itself even when they were elected on precisely such a program. Any weakening of the restraints upon the state's reconstructive capabilities seems at the same time to endanger the basic security of the individual against oppression by his rulers. The constitutional arrangements that result in this formula for paralysis (…) characteristically multiply the number of independent centers of power that must be captured, or persuaded to consent, before state power can be effectively mobilized behind any transformative objective.[100]

The liberal techniques of checks and balances result in the systematic setting of obstacles in the way of any transformative project, even one approved of by the people.

A particularly clear example is provided by the New Deal in the 1930's. The Supreme Court kept striking down as unconstitutional the efforts of the Congress and President Franklin D. Roosevelt to deal with the Great Depression, on the grounds that they sought an

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[99] Ibid.
[100] Unger (1987), p. 72.

extensive regulation of the economy. The fact that the Supreme Court resisted the programs in spite of their strong popular support shows that Shklar's belief in the courts' "natural" adjustment to social consensus may be misguided. The people had to reelect the president and the other supporters of the New Deal to insist that fundamental change was wanted and force the Supreme Court to allow the proposed legislations to pass. Structural change, while not impossible, becomes extremely difficult, and made possible, in this case, only by the lucky fact that a Supreme Court Justice changed his mind, allowing the impasse to be broken. According to Unger, a system so reluctant to implement change, even in the face of an economic catastrophe, is not a good one, as it lacks the ability to respond to crisis in a timely manner. Hence for Unger, the worst-result principle demands moving away from liberal structures to avoid their debilitating effects on society.

Unger further emphasizes that totalitarian regimes were established *against* the people's will and because of fragilities of the liberal democratic state. He stresses that the collapse of European democracies of the interwar period was sometimes hastened by the relative immobility to which the constitutional arrangements often condemned the governments.

In the wake of World War I, indeed, many socialist countries in Europe, like Germany, Austria, and Poland, promulgated new constitutions. These showed a strong commitment to the techniques of dispersion of power and primarily aimed at ensuring the obedience of the executive to the parliament. So great power was given to the parliament and at the same time heavy constraints were imposed upon the government that had to execute legislative policy. These constitutions were soon revised, because of their evident debilitating effects, thus leading to "two immediate causes: the change in the balance of political forces, from left to right, and the desire to give the executive decisional mobility in a domestic and

international circumstance of perpetual insecurity."[101] But it was too late. The new elements introduced in the revised constitutions "proved insufficient to rescue states that had already been caught up in the deadly struggles of the interwar period."[102] The revisions just hastened the states' collapse.

Hence the perpetuation of impasse, supposed to protect against abuses of power, turns out to be totally counterproductive to its function, since it paralyzes the state's ability to revise, adapt and preserve itself when endangered. The link between the techniques of checks and the safeguards of freedom is thus an illusion, as impediments to popular initiative are likely to bring about what they were designed to prevent – tyranny. Unger's worst-result norm demands avoidance of liberal politics not only because of their de-energizing effects, but also – and most importantly – because they are ineffective in their defense of freedoms.

In contrast to this paralytic, de-energized politics, which frustrate us from our ability to experiment, Unger argues in favor of empowering the party in office to execute its program. Historical analysis, indeed, reveals that traditional liberties have been strengthened by such means. The Polish, the Austrian and the German constitutions of the interwar period, though unable to avoid the states' collapse, contained elements of an alternative constitutional program, which was developed later, "more explicitly, by constitutions like the Icelandic of 1944, more lopsidedly by the French of 1958 and 1962, and most fully by the Portuguese of 1976."[103] This program displayed a "dualistic structure" because it established two governmental powers elected by direct universal suffrage – the parliament and the presidency. One of the system's effort was

> (…) to give the acting government decisional initiative by allowing it to lean on either the president or the parliament and not to fall automatically or immediately if it had lost the support of either. The goal therefore became to permit the rapidity and continuity of governmental action by making the ability to act effectively independent of a consensus among all the powers of the state.[104]

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[101] Ibid., p. 446.
[102] Ibid., p. 447.
[103] Ibid.
[104] Ibid.

Allowing government to implement structural change is a key element of the state's plasticity and therefore its ability to safeguard and promote freedoms.

Yet the primary goal is to maximize the popular aspects of indirect democracy. So some limits should be put on executive power, to the extent that it may hinder mass participation. This other key element of energizing politics was already present in the alternative constitutional program sketched by European democracies between and after the two world wars.

> It consisted in the use of devices that allowed different powers in the state to resolve deadlocks by provoking immediate general elections at which they themselves would be at risk. (…) For example, the parliament might be able to remove the president on purely political grounds, dissolving itself by this very act. The president might simultaneously be allowed to bring about an electoral confrontation with a hostile parliamentary majority.[105]

These parallel rights of appeal to the mass electorate, combined with the empowerment of the party in office, clearly reveal a will to move away from the paralyzing techniques of checks and balances. The perpetuation of impasse that is crucial to liberal mechanisms is here rapidly resolved by means of immediate or delayed devolution to the electorate.

Unger's programmatic argument for political arrangements that energize the citizen offers cogent insights that can be implemented bit by bit in our current formative contexts. The program's feasibility is attested to by these reforms undertaken in Europe in the interwar period, which Unger views as small-scale models for a more radical change.[106] The institutional structures that are to ensure the achievement of transformative projects and encourage mass participation can be realized in many different ways. The multiplication of branches of government and the duplication of functions among them, that would allow different powers to perform the same acts, are the kind of energizing measures that Unger is

[105] Ibid.
[106] See Unger (1987), pp. 441-9.

calling for. Voting could be mandatory, as it is in Australia, for instance; but this is just an option among many others.[107]

Of course, the engagement of the citizen in the political process requires general and civic education, that is the teaching of the shared memory and institutions of the state. It also requires information, for the state needs to be vitalized by an active political forum in which information and arguments are exchanged. Education and information are already valued by liberal democracy. In such a context that fosters well-informed and educated citizens, it is hard to see, for Unger, how mass popular participation could bring about tyrannical outcomes.

IV. The Reconstructive Mission and its Missing Agent

Unger claims to only be furthering the liberal project of protecting individuals' rights. He elaborates on the institutional means of ensuring the preservation and enjoyment of a system of rights. Before sketching a possible alternative framework, Unger argues against the current arrangements in which the specific task of protecting fundamental liberties is undertaken by the judicial branch. His denial of the importance of an independent judiciary is grounded on a twofold argument: it is not a reliable instrument, and it is antidemocratic.

As we saw with Unger's analysis of the "judicial obsession" and the antidemocratic commitments it reveals, entrusting unaccountable justices with the power to decide on issues of public interest amounts to "denying collective problems their collective solutions."[108] Unlike Shklar's argument which distinguishes between the cases that are presented before courts, thereby subjecting itself to a legalistic rebuttal, Unger's thesis rests on a crucial

[107] Unger (1996), p. 17. Unger enumerates a number of "devices favorable to a persistent heightening of the level of popular political mobilization": combination of personal plebiscitarian and parliamentary forms of power, resort to plebiscites and referenda, facility to call anticipated elections at the initiative of any branch of government, free access for a broad range of political parties and social movements to the means of mass communication, public financing of political campaigns, etc.

[108] Ibid., p. 10. Unger's point is directed against regimes of de-energized politics in general; but it applies especially well to judicial power.

distinction between two sorts of adjudication or *holding* (the jurisprudential term to describe what is legally decided in a case): low-level analogizing and rationalizing legal analysis.

The latter style of adjudication, as we now know, consists in making law appear rational and legitimate. Judges who decide cases under the auspices of rationalizing legal analysis provide broad holdings, as they appeal to basic principles of justice and morality that, they claim, are the ultimate basis of the legal system. Dworkin, the epitome of rationalizing legal analysis, describes it in the following terms:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness. (…) According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice and fairness, and procedural due process that provides the best constructive interpretation of the community's legal practice.[109]

Rationalizing legal analysis – what Dworkin calls the adjudicative principle of inclusive integrity – leads judges and lawyers to de-emphasize the specific facts of the case in order to assert general claims about rights and justice. Hence rationalizing legal analysis is properly a law-completing and law-reconstructive activity.

Low-level analogizing, for Unger, "stands to rationalizing legal analysis as crawling stands to walking."[110] When judges practice analogical judgments, they focus on the particular facts of the case and the holdings issued are as narrow as possible. Low-level analogizing is a much more modest, realistic and fair style of adjudication than rationalizing legal analysis. According to Unger, courts are adequate when it comes to settling localized disputes over the boundaries of rights; but they should not do more. Specifically, courts must not decide classes of disputes, as they do under rationalizing legal analysis, for "such an expertise properly belongs to citizens."[111] The responsibility of completing and reconstructing the law is that of lawmakers, not judges. Unger highly circumscribes the courts' power and

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[109] Dworkin (1986), p. 29.
[110] Unger (1996), p. 59.
[111] Ibid., p. 109.

stresses that judges outrun their political legitimacy when they decide broadly, resolving categories of disputes.

Unger specifically refers to the courts' new adjudicative practices, very different from the traditional ones, of enforcing constitutional guarantees by getting deeply involved in governmental organizations like school and prison. The agents of procedures of complex enforcement "are collective rather than individual," as in class-action lawsuits, and their aim is "to reshape an organization or a localized area of social practice frustrating the effective enjoyment of rights."[112] Unger insists that the judiciary is not the proper agent for this reconstructive mission.

> Neither type of adjudicative corps [officials or ordinary laymen] may be well suited to conduct a radical extension of complex procedural intervention. The expert judges, with their vaunted immunity from direct influence by the other powers in the state, or even by the general electorate, would, with such procedural weapons in hand, turn into a nearly absolute censorial authority. (…) The popular tribunals of ordinary laymen are equally disabled from the performance of this task because both their inexpertise and their fragmentation prevent them from acting effectively as the agents of a systemic reconstructive intervention in social life.[113]

Structural injunctions are currently carried out by the judiciary in the U.S., even though courts are ill equipped and inadequate for the task. "Better some penetration of the structural background to subjugation than none,"[114] comments Unger, thereby insisting on the crucial importance of the reconstructive task, as well as acknowledging the courts' partial successes in fighting against structures blocking the effective enjoyment of rights (e.g., *Brown v. Board of Education* against racial segregation in schools). But the proper agent of reconstruction is missing.

The judiciary is an incongruous agent, both ineffective and politically illegitimate, because the task of challenging and intervening in institutional arrangements to ensure constitutional rights lies at the heart of democratic experimentalism, and thus belongs to the people. "The best response, then, is to forge the new agent: another branch of government,

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[112] Ibid., p. 30.
[113] Unger (1987), p. 452.
[114] Unger (1996), p. 32.

another power in the state, designed, elected, and funded with the express charge of carrying out this distinctive, rights-ensuring work."[115] The procedural devices of complex enforcement must be a democratic instrument in the hands of the people.

V. Remaking the System of Rights

Unger underlines the importance of remaking the liberal system of rights, insofar as it is the indispensable preamble to institutional and social reconstruction. Indeed, a system of rights, for Unger, is "an institutionalized version of society, which is to say, a form of social life acquiring a relatively stable and delineated form and generating a complicated set of expectations."[116] As we saw with the European models of the interwar period, in section III, structural change starts with constitutional reform. But amid the energizing constitution that Unger calls for, a certain set of rights has a particular importance in the remaking of the system of rights.

Indeed, Unger especially insists on the importance of an entrenched set of rights, not lending itself to experimental capability. The existence of entrenched rights, which Unger calls "immunity rights," undercuts an important objection to his program, which states that the absence of checks to legislative and executive activities would allow the majority of the people to tyrannize over a minority. For Unger, not everything is up for grabs in empowered democracies.

> Immunity rights protect the individual against oppression by concentrations of public or private power, against exclusion from the important collective decisions that influence his life, and against the extremes of economic and cultural deprivation. They give him the justified confidence of not being fundamentally endangered by the expanded conflicts of an empowered democracy.[117]

Immunity rights provide individuals with a key safeguard against governmental and "private" abuses of power. Unger thus appears sensitive to the idea, as we saw with Montesquieu, that

[115] Ibid., p. 33.
[116] Ibid., p. 508.
[117] Ibid., p. 524.

for civil liberty to *be*, it must be *perceived*. The individual's feeling of her security, her freedom from fear – i.e., her not fearing changes that could threaten her basic rights – is crucial to give her the confidence to get involved in public affairs. As Unger puts it, "freedom as participation presupposes freedom as immunity."[118] Immunity rights are hence central for Unger because they represent the safeguards of liberty which enable individuals to engage into creative experiments with their fellow citizens.

An empowering democratic constitution of the sort Unger describes protects two major sets of immunity rights: 1) freedom against governmental or private oppression, including freedoms that are already upheld by current liberal constitutions: freedom of expression and association and freedom from arbitrary imprisonment or imprisonment for subversive activity; and 2) welfare entitlements, including provision for nourishment, housing, health care, and education, with rigid standards proportional to the wealth of society, as well as the rejection of job tenure, of consolidated property rights,[119] and the sharp curtailment of inheritance. Unger insists that "Immunity rights define the safeguards – the minimal defenses – with which the individual enters all the dealings in which he does participate,"[120] so that none of these safeguards lend themselves to negotiation. And for Unger, the only way to surely and safely entrench these rights is to rigidly define them.

Unger recognizes that currently the adjudicative method of rationalizing legal analysis is a necessary response to the incompleteness of the laws. This is especially true in disputes over the rights guaranteed by the Constitution, which are very general and often stated in ambiguous and vague provisions. So Unger especially emphasizes the importance of initially defining the system of rights in a rigid manner, that is propitious to low-level analogizing. A

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[118] Ibid., p. 525.
[119] In "The Liberalism of Fear," Shklar counts legally guaranteed proprietorship as a key element in the dispersion of power. Unger comments, "the defenders of conventional liberal democracy (…) err in viewing consolidated property rights (which they mistakenly identify with the market form of organization) as an indispensable condition of freedom, indispensable if only because their replacement would destroy liberty." Unger (1996), p. 525. For Unger, bundles of property and market rights can be rearranged in different ways.
[120] Ibid., p. 530.

model of rigid legal definition is provided by traditional rights of contract or property. With immunity rights rigidly defined, there is little or no latitude of interpretation either for the individuals at the moment of their exercising these rights, or for the judges in courts.

> Consequently, a bright line circumscribes the boundaries of each immunity right. The rightholder can expect to distinguish confidently between the factual circumstances in which the law protects him in the asserted exercise of such an entitlement and those in which it does not.[121]

For Unger then, individuals know exactly what each right allows, and likewise, judges can operate as rigorously as they do with contract rights: they merely enforce the entitlements, which are clearly defined in the contractual agreement.

Hence Unger believes that with a clearly defined system of immunity rights, there can never be any deep contention about what these rights allow, and so there is no need for federal courts to review legislative enactments and their execution for consistency with such rights. The legislature, on the one hand, would not try to pass laws that violate the immunity rights for the same reason that the judge has no interpretive freedom, i.e., because the rights are rigidly and overtly defined. And as far as the control over the effective enjoyment of these rights goes, on the other hand, Unger believes this task entails intervening in social structures to enforce broad constitutional guarantees – task for which the judiciary is not fit. So for Unger, courts are only adequate for settling localized disputes, under the auspices of low-level analogizing, while democratic centers of power carry out the task of reconstructing the law and ensuring the enforcement of rights.

Unger's argument rests on the unchallenged assumption that immunity rights and contract and property rights can operate similarly. But this supposed similarity of structural features does not stand scrutiny. The immunity rights entrenched in the constitution cannot be defined as rigidly as contract rights, because their very nature is to be general, possibly vague, so as to adapt to society's future evolution. For instance, it was impossible for the framers of the Constitution to anticipate technological developments such as the Internet, which

[121] Ibid., p. 530.

complicates the issue of its protection or not under the freedom of speech. Immunity rights, likewise, cannot be so specific as to cover beforehand all possible future cases.

Because of the generality of constitutional rights, courts need to be able to issue broad holdings, appealing to the underlying principles of these rights, such as a conception of justice that grounds welfare entitlements. Referring to the inner logic of the rights further entails the possibility of issuing, not just case-by-case decisions, but decisions over classes of disputes, since the judge must be able to display in the case certain aspects, grounds of the judge's decision, that further cases may share. Hence something like rationalizing legal analysis is unavoidable when it comes to constitutional or immunity rights – even in Unger's empowered democracy. And since rationalizing legal analysis requires an expertise that is beyond the people's power, the judiciary really appears as an indispensable agent to guarantee the protection of the state's constitution.[122]

VI. Preventing the Worst or Aiming at the Best?

Unger insists that constructing the law and intervening in practices are democratic activities *par excellence*. According to his programmatic argument, decisional centers can only belong to elected and accountable branches of the state, i.e., the executive or the legislative, the judiciary being neither a legitimate nor a reliable decision-maker for changing large area of social practice. Unger circumscribes the judges' role to resolving factual disputes in individual cases, and rejects adjudication that exceeds a strictly localized level and rule over classes of disputes, for that amounts to usurping a major democratic activity.

The agent that Unger sketches as fit for the rights-ensuring work is elected by the people, accountable before them, and most importantly for Unger, having the power to

[122] I thank Andrew Altman for recommending to me this specific line of attack against Unger's argument. See his *Critical Legal Studies: A Liberal Critique* (1990).

challenge and correct practical structures of society. This new agent of reconstruction is a particular instantiation of Unger's program to bring forth energizing politics by multiplying branches of government, and to advance the "democratic project," which Unger defines as:

> (…) the effort to make a practical and moral success of society by reconciling the pursuit of two families of goods: the good of material progress, liberating us from drudgery and incapacity and giving arms and wings to our desires, and the good of individual emancipation, freeing us from the grinding schemes of social division and hierarchy.[123]

Although Unger claims to be only bringing further the liberal project, he does not really espouse the worst-result criterion. For he does not aim so much at preventing tyranny and violations of fundamental liberties as he aims at promoting ideals of enhanced freedom.

This is certainly an attractive goal, not precluded by the worst-result principle, which does not provide any complete scheme on how to run a liberal society, for it only indicates the first steps in the political organization. But the question is whether aiming at a better society, and focusing on how to get there, makes one overlook safeguards against dangers of macro- or micro- illiberality. Unger believes so much in the idea that freedom equals flourishing, and consists in engaging oneself into creative experiments with other individuals and the political community, that he seems, in the last instance, to simply be *confident* that encouraging democratic participation and fostering an active citizenry will *not* bring bad political outcomes. Therefore, he thinks, all decisional centers should run democratically, without other safeguards than the set of immunity rights guaranteed by the state's constitution.

I have shown, in the preceding section, that immunity rights cannot but be adjudicated by something like rationalizing legal analysis, so that courts still appear indispensable under the super-democratic constitution Unger calls for. Another argument against hid deflation of the judiciary is that Unger's trust in the citizenry seems too hopeful or wishful thinking, as it relies on a somewhat idyllic picture of human nature. Anyone who doubts this optimistic picture of human beings as essentially social and creative creatures would not be fully

[123]Ibid., p. 6.

persuaded by Unger's argument. One would ask for more built-in defenses against the potential corruption of the system, given that it is run by fallible agents.

Even if democratic participation is a value, an end in itself, as Unger seems to think, it does not follow that such participation should be the ultimate means to safeguarding freedom. Citizen involvement, surely, is essential as a part of political decision-making, but it is not reliable as the central mechanism of defense against abusive power. A state that practices energizing politics is endowed with such a great ability to implement structural change that it should contain a strong, politically independent, mechanism of defense against abusive power. Education and information are not enough in democracy; it is always possible that a well-educated, well-informed and mobilized people tyrannize over individuals, either officially by twisting the constitution in a certain way, or officiously but on behalf of the state's good, as with the Jack Bauer Syndrome. If this is true even in Unger's super-democracy, *a fortiori* is this true in our current, imperfect liberal states.

Hence an active citizenry having political decision-making powers cannot at the same time ensure a reliable defense against abuses of power, since it may be the one abusing power. An independent judiciary, entrusted with the power of checking the other branches' conduct and protecting against violations of liberties, is indispensable. It is the fittest branch to meet the worst-result principle, i.e. to prevent tyranny and safeguard civil freedoms. So it should not be deflated, but rather, it should be supplemented with democratic participation, such as the devolution of social policy issues to the electorate, while issues involving violations of liberties would be settled by courts. The presence of an independent judiciary is the best hope against the chances that a mobilized people tyrannizes over individuals. Its being complemented by democratic involvement ensures that courts do not become, as Unger fears,

an “absolute censorial authority.” This specific setting would encourage an active citizenry while dividing power and limiting government in order to protect fundamental freedoms.

Chapter IV: Wartimes – Civil Liberty vs. National Security

In this chapter, I take up a 'pragmatic' defense of the judiciary that relies on the worst-result norm. I use the term 'practical' to mean that I am only concerned with the courts' effectiveness in preventing political evils from occurring. My goal is to make the case for the judiciary's checking powers by looking at past and present history, and to abstain from grounding my defense in a certain conception of democracy or of justice, upon which not everyone would necessarily agree. For instance, I am not interested in the question of whether courts that exercise judicial review are antidemocratic, i.e., whether they have a place in a genuinely democratic society, because I believe it is irrelevant to whether they are effective in safeguarding liberty.

As the title of this chapter indicates, I want to focus on judicial defense of civil liberties in wartime, because it is usually considered to make the best case *against* the reliability of courts to carry out their watchdog mission. Wartimes put civil liberties at high risk, for government might abuse its power and trample upon them on behalf of national security. Violations of civil liberty may indeed appear as a necessary evil in the context of war or the threat of war. It is then the judiciary's role to ensure that government does not exceed its power and infringe upon individuals' liberties. Yet historically, the judiciary has not always been effective at protecting against the executive seizing powers which enable it to tyrannize over individuals.

In this chapter, I will especially focus on the Japanese Internment cases of World War II, *Hirabayashi*, *Korematsu* and *Endo*, because these are viewed as the worst blow to civil liberty in 20th century America. They represent the worst-case scenario of judicial constraint, since in two of them, courts sided with government, against civil liberty. Yet I argue that the

judiciary is the fittest branch to meet the worst-result principle, understood as prescribing the minimizing of chances of governmental criminality so as to ensure individuals' fundamental rights. I offer three arguments to back up this thesis.

The first argument was partly elaborated in the preceding chapter, as I argue against the claim that a watchful citizenry of the sort Unger encourages could be relied upon in the place of an independent judiciary – which I dub the "Watchful Citizenry Argument." Historical analysis further makes the case against relying upon the people at large, or any democratically elected power, insofar as the orders of interment were supported by the public and their representatives, and thereby received the benefit of a great degree of democratic legitimacy.

My second argument states that *Endo* embodies the judiciary's normal (i.e., supposed and usual) conduct, which is to step in and check constitutional violations right away. I call it the "Argument from the M.O." *Endo* and the second half of 20th century show that as a general rule, courts check unconstitutional legislative enactments and prevent the government from tyrannizing over individuals – and they do so in a timely manner.

My third argument, dubbed the "Worst-Case Argument," is sensitive to the exceptions to the general rule, which *Hirabayashi* and *Korematsu* represent. I think that these tragic cases instruct us about the normal (usual) conduct of the government in wartime, which is to favor order at the expense of freedom and to abuse power. They also indicate, in counterpoint, that if the judiciary does not provide any absolute guarantee of protection, its absence does provide a guarantee of arbitrariness and a slippery slope to tyranny.

These three arguments will be respectively developed in the second, third and fourth section of this chapter. But first, I shall briefly describe, in the next section, the three famous cases that individuals brought in courts against the executive program ordering the

confinement of Japanese and Americans of Japanese ancestry, and what grounded their rulings.

I. Facts

In 1940, less than a year after the outbreak of World War II, Germany occupied Poland, Denmark, Norway, Holland, Belgium and France. Japan had entered into an alliance with Germany in 1940, and soon proved to be a serious threat, as Japanese armies successfully attacked Malaysia, Hong Kong, the Philippines and Wake and Midway Islands in December 1941. Simultaneously, they struck against Pearl Harbor, forcing the U.S. to enter the war. President Franklin Roosevelt immediately appointed a commission, chaired by Owen Roberts, an Associate Justice of the Supreme Court, "to ascertain and report the facts relating to the attack made by Japanese armed forces upon the territory of Hawaii on December 7, 1941."[124] The Roberts Commission found that there had been espionage in Hawaii:

> There were, prior to December 7, 1941, Japanese spies on the Island of Oahu. Some were Japanese consular agents and other were persons having no open relations with the Japanese foreign service. These spies collected, and through various channels transmitted, information to the Japanese Empire respecting the military and naval establishments and dispositions on the Island.[125]

Not only the U.S. military leaders, but also state and local public officials, especially in California, called for "relocation" of persons of Japanese ancestry from the West Coast to the interior of the country.

On February 19, 1942, President Roosevelt issued Executive Order 9066 that authorized the removal from the West Coast of 120,000 individuals of Japanese ancestry, two thirds of whom were American citizens. Congress passed a law imposing criminal penalties for violations of the order or of whatever regulations might be issued to implement it. First, a curfew was imposed on the ethnic Japanese, then they were required to report to relocation

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[124] Quoted in Rehnquist (1998), p. 189.
[125] Ibid.

centers, and finally they were physically moved to camps located in the interior of California and in the mountain states.

Gordon Hirabayashi, an American citizen born to Japanese parents, disobeyed the curfew requirement and failed to report to a relocation center. He was consequently indicted and convicted on two misdemeanor counts, for each of which he was sentenced to three months in prison. In May 1943, he argued before the Supreme Court that the executive orders he was charged with violating were unconstitutional, as they violated the Equal Protection Clause granted by the Fourteenth Amendment. The Court only dealt with the curfew requirement, because Hirabayashi's sentences for each conviction were to run concurrently, so that upholding one charge would be sufficient to have him serve his sentence. The Supreme Court ruled that the curfew requirement was legitimate, on the grounds of national security and military necessity.

The government's brief written for *Hirabayashi* recited the facts justifying the orders that were being challenged, including the report of the Roberts Commission. Not only the Japanese victories, but the West Coast war industries, were brought up as evidence for the threat. As the government put it in its brief,

> In view of such concentration of defense facilities in this region and in view of the course of the war at that time, it was of the highest order of military importance to take into account the extent and nature of Japanese residents on the West Coast and their possible cooperation with the enemy.[126]

Chief Justice Stone, who wrote the Court's opinion, adduced the facts set forth by the government, that showed the seriousness of the Japanese threat after Pearl Harbor.

> That reasonably prudent men charged with the responsibility of our national defense had ample grounds for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted.[127]

Hence Justice Stone concluded that the measures taken against the ethnic Japanese were the work of prudence and reasonableness.

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[126] Ibid., p. 197.
[127] 320 U.S., at 94.

Another case was filed by Fred Korematsu, American citizen born to Japanese parents, who was convicted of remaining in San Leandro, California, in violation of a military exclusion order applicable to him. He petitioned the courts for a writ of *habeas corpus*, arguing that he was deprived of fundamental constitutional rights, especially those granted by the Due Process Clause of the Fifth Amendment and by the Equal Protection Clause of the Fourteenth Amendment. In October 1944, the Supreme Court upheld his conviction, ruling that because the United States was at war, the government could constitutionally intern him without any adjudicative determination that he had done anything wrong. Justice Black, who wrote the opinion, largely based the Court's reasoning on Stone's earlier decision.

In contrast, in the case of *Endo*, decided at the same time as *Korematsu*, the Court reached quite a different result. Mitsuye Endo had submitted to an evacuation order and was confined in a relocation center. She filed a case against the U.S., claiming that she was a loyal citizen against whom no charge had been made and that she was therefore entitled to her relief. The government agreed that she was a loyal citizen, and not charged with any offense. The Court decided that Endo was entitled to release under these circumstances. The majority of the Justices had found that the initial order of evacuation, but not the detention after the evacuation, was reasonably justified in terms of military necessity. Indeed, the U.S.' military position was much more favorable at the end of 1944 than it had been when the order was issued, so that the entire program was terminated soon after *Endo*'s decision.

II. Against the Watchful Citizenry Argument

According to Unger, the fittest agent for the tyranny-preventing task is an active citizenry, well-educated, well-informed, and politically enabled to express themselves and experiment. As we saw in chapter III, the multiplication of centers of power and the enabling

of the party in office to execute its program are the key arrangements that empower the citizens.

When it comes to fighting against structural obstacles to the effective enjoyment of rights, Unger conceives of the judiciary, the current agent for the task, as ineffective and inappropriate, so that a new agent, democratically elected, is needed. Unger showed that the task of preventing tyranny (e.g., foreign belligerent occupation during WWII) necessitated a powerful executive branch capable of adapting to the circumstances and of implementing the required change. In any case, for Unger, courts should only have a very restricted role of adjudication of deciding case-by-case, fact-oriented disputes by following the method of low-level analogizing. According to Unger, the worst-result principle sets a problem that concerns the people and thus should and can effectively be solved by the people.

The Japanese Internment cases offer a crucial historical counter-example to Unger's thesis, insofar as the public and their representatives not only passively failed protecting civil liberty, but also actively fought for the relocation of Japanese and Japanese-Americans. This seems to confirm, instead, Shklar's remarks on the courts' natural tendency to adjust to social consensus when there is one.

First, no significant element of public opinion opposed the order of internment. For instance, the American Civil Liberties Union, which filed briefs for *Hirabayashi* and *Korematsu*, was noticeably silent at the time that the program was put into operation. The public silence was not due to ignorance of the program, since, in fact, a large portion of the population called for it before it was in place. Residents were fearful of ethnic Japanese among them, who had been prevented from assimilating in the Caucasian population, mainly because of laws restricting their rights. As the Court's *Hirabayashi* opinion highlighted it, Japanese emigrants were actually isolated and bound by strong solidarity. Moreover, the fact that Japan declared war and aggressed against the U.S. stirred virulent anti-Japanese

sentiments in the population. Hence the citizenry cannot be accused of lacking watchfulness; but what they were closely watching, they thought, was national security.

Furthermore, public officials, particularly in California – Governor Culbert Olson, Attorney General Earl Warren, and Los Angeles Mayor Fletcher Bowron – were also in favor of a removal of ethnic Japanese from the West Coast. The commanding officer of the Western Defense Command, General John DeWitt, first resisted the clamor to remove the Japanese. But state and local public officials were insistent, and they were supported by their states' congressional delegations. The chorus became more insistent when the report of the Roberts Commission was released in late January 1942. Hence elected officials did not appear any more concerned about civil liberty than the public at large, because they were also caught up in what they thought was an urgent matter of national safety. For this reason, it is plausible to suggest that even a particular center of the sort Unger calls for, democratically elected to carry out the task of protecting civil liberty, would have considered the situation as a case of "supreme emergency,"[128] as Walzer calls it, and might have sanctioned Executive Order 9066.

Finally, the immediate ratification of the executive order by Congress entrusted the President with maximum authority as defined by the Constitution. From the point of view of the government, congressional stamp is crucial, because it means broader leeway; it strongly empowers the executive branch. For instance, it is plausible to suggest that the executive conduct of the current war on terror partly results from the AUMF, a congressional act authorizing the President to use "all necessary and appropriate force" against any persons or groups he determines to be involved in the 9/11 attacks, or to have helped or provided haven for those involved. When Congress backs up the executive, the President's authority is at its maximum. Executive Order 9066 thus received a great degree of democratic legitimacy, and

[128] Walzer (2004), essay three "Emergency Ethics," pp. 33-50.

seems to illustrate the kind of plasticity Unger calls for, i.e., an empowered executive able to implement quick change in order to adapt to what it views as danger.

Hence the first years of the war seem to satisfy the conditions of a "normal period" in the sense defined in chapter II. In normal times, society shares a common view regarding one subject matter, and appears bound by this shared understanding of the situation. It is hard to see how Unger's democratic arrangements could ever succeed in protecting civil liberty in normal times such as these, when the people and their representatives are so fearful of the state's security that they become oblivious to the threats to freedom. Therefore, a watchful citizenry, though very important for the health of a liberal society, as I showed in chapter II with the ACLU, is not sufficient and should not be exclusively relied upon to protect civil liberty and prevent tyranny. It is crucial that a politically independent element be added to the device to meet the worst-result principle – a politically independent agent such as the judiciary.

III. The Argument From the M.O.

One major mission of courts in a liberal democracy consists in controlling the constitutionality of legislative enactments and executive conduct, and in blocking any violation of fundamental rights. The judiciary is enabled to accomplish this mission by means of its checking powers, without which courts would not be an effective safeguard. Indeed, they are not just watchdogs drawing attention to constitutional violations; for they have the power to actually step in right away and block the violation, thereby setting a precedent that impedes further abuses. The second half of the 20th century shows that as a general rule, courts adequately perform their tyranny-preventing task, that is they check unconstitutional laws and prevent governmental abuses of power – and they usually do so in a timely manner.

The Court's *Endo* decision illustrates the judiciary's normal modus operandi. Endo claimed that her internment was unconstitutional because no charge had been made against her, and the government acknowledged that she was not charged with any offense. The Court's ruling adduced the provisions of the Executive Order and the Act of Congress that ratified it, showing that the initial evacuation from a military zone, but not the detention after evacuation, was authorized – and justified in terms of military necessity – so that Endo was entitled to her release.

That the Court based its reasoning on the provisions of the order indicates that democratic legitimacy is one of its first concerns. Nevertheless, although Congress and the President could have changed these provisions so as to authorize the internment, the Court's opinion strongly hinted at constitutional difficulties if that were to be done, because the assumption that an entire racial group was disloyal violated the Equal Protection Clause. The Court's very priority indeed is to ensure that constitutional rights be respected. So with *Endo*, the judiciary stepped in to block violations of an individual's fundamental liberty, on the basis of the government's and Congress' own explicit directives, and reminded public and state officials of the basic rights entrenched in the Constitution, so as to undermine further attempts to legitimize abuses of power.

Further, the Court's *Endo* decision showed no allegiance whatsoever to the government's claims of military necessity. On the contrary, the Court examined and contested these claims, affirming that prolonged detention after the evacuation was not reasonably necessary to prevent sabotage or espionage. Some sort of *prima facie* distrust toward governmental claims of military necessity is essential to effectively limiting the Jack Bauer Syndrome (i.e., the tendency of executives to abuse their power on behalf of national security), which would become the normal mode of operation if it was not checked. Indeed, the executives' proclivity to abuse power goes hand in hand with constant attempts to

rationalize and legitimize violations of rights as collateral damage necessary in the fight against a greater evil. The judiciary stands as a constant reminder of the inviolability of fundamental liberties and checks the government's attempts to circumvent them.

In *Endo*, the Court effectively thwarted the spread of the Jack Bauer Syndrome by demanding evidence for Endo's detention, in the form of an individual determination of disloyalty. In doing so, the Court rejected the constitutionality of the order's assumption that the entire racial group was disloyal, applying the Due Process and Equal Protection Clauses. Hence *Endo* set a strong precedent for all similar cases involving the detention without charge of Japanese-Americans, and stopped the government from tyrannizing over innocent individuals. *Endo* literally annuls the precedential value of *Hirabayashi* and *Korematsu*, repairing past wrongs and impeding further ones, thereby marking the victory of civil liberties against executive abuses of power.

Turning to the current war on terror, the Supreme Court has also appeared reliable in stepping in and thwarting executive abuses of power. In *Hamdi v. Rumsfeld* in particular, decided in June 2004, courts denied the alleged power of the executive branch to hold indefinitely U.S. citizens as unlawful combatants. Hamdi was captured in Afghanistan by the Afghan Northern Alliance in 2001 and then turned over to U.S. military authorities during the U.S. invasion. The U.S. government alleged that Hamdi was there fighting for the Taliban, while Hamdi, through his father, has claimed that he was merely there as a relief worker and was mistakenly captured. Hamdi was initially held at Guantanamo Bay, but then transferred to a naval brig in Norfolk, Virginia when it was discovered that he was a U.S. citizen. The Bush administration claimed that because Hamdi was caught in arms against the U.S., he could be properly detained as an unlawful combatant, without any oversight of presidential decision-making, or without access to an attorney or the court system.

In June of 2002, Hamdi's father, Esam Fouad Hamdi, filed a habeas petition in the United States District Court for the Eastern District of Virginia. The court ordered that a federal public defender be given access to Hamdi. After the case was reversed by the Fourth Circuit and sent back to the District Court, the court found that the government's evidence offered in favor of his detention was woefully inadequate, based mostly on hearsay and bare assertions, and thus ordered the government to produce documented evidence, so as to allow the court to perform a "meaningful judicial review." The government appealed the order and the Fourth Circuit once again reversed the District Court, ruling that the broad war making powers granted to the President by the Constitution prohibited courts from interfering in this vital area of national security. Hamdi's father appealed to the Supreme Court.

Eight of the nine justices of the Court agreed that the executive branch does not have the power to hold indefinitely a U.S. citizen without basic due process protections enforceable through judicial review. Justice Sandra Day O'Connor, who wrote the plurality opinion, affirmed that although Congress had expressly authorized the detention of unlawful combatants in its AUMF, due process required that Hamdi have a meaningful opportunity to challenge his detention. O'Connor did not write at length on Hamdi's right to an attorney, because by the time the Court rendered its decision, Hamdi had already been provided one. However, O'Connor did write that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand." The plurality held that judges need not be involved in reviewing these cases, rather only an impartial decision maker was required to determine the factual basis of individuals' classification as enemy combatants.

Through Hamdi's individual case, the Court acted at the macro-level, firmly checking the Bush administration's attempts to turn the presidential war making powers into sheer discretion, as one might fear these come down to. The judiciary effectively constrained executive conduct of war by forcing it to abide by the system of rights defined by the

Constitution, setting precedents for future similar cases, such as *Rumsfeld v. Padilla* and more recently, cases involving non U.S. citizens, such as *Rasul v. Bush* and *Hamdan v. Rumsfeld*. Hence the Jack Bauer Syndrome is prevented from becoming the norm, as local violations of civil liberty are checked.

A case from the U.K. also illustrates the judiciary's efforts to limit the Jack Bauer Syndrome and impede officials from tyrannizing over other individuals on behalf of national security. In *A and others (Appellants) (FC) and others* v. *Secretary of State for the Home Department (Respondent) [2005] UKHL 71*, the United Kingdom's law lords ruled that evidence obtained by torture should never be used in British courts. The ruling overturns a decision that the Court of Appeal made last year, finding that the Special Immigration Appeals Commission (SIAC), the anti-terror court, was entitled to consider information extracted under duress. The law lords stressed that the principles of common law should take precedence over SIAC's practices.

Lord Hope of Craighead stressed in his ruling, "It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture."[129] He goes on to quote English jurists and philosophers who kept expressing their abhorrence of torture from the fifteenth century on, even when the practice was prevalent in the states of continental Europe.

> In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.[130]

By strictly prohibiting the use in courts of information extracted under duress, the judiciary indirectly assures that the Jack Bauer Syndrome, viz. the practice of torture, not be normalized among intelligence, police, military and paramilitary agents involved in the fight against

[129] Case available in doc. PDF (2005), p. 5.
[130] Ibid., p. 6.

terrorists. The judiciary is thus reliable in meeting the worst-result principle that requires protecting fundamental liberties and preventing tyranny.

IV. The Worst-Case Argument

If *Endo* can be seen as typical of effective judicial review, *Hirabayashi* and *Korematsu* to the contrary are atypical, infamous failures of the Supreme Court, as they inflicted a severe blow to civil liberties. The fact that they are exceptions to the rule does not diminish their nefarious effect, that is the actual suffering of individuals who felt betrayed by the Constitution. However, even though *Hirabayashi* and *Korematsu* represent the worst-case scenario of judicial review, they do not disconfirm the courts' general reliability in protecting fundamental liberties. What they do prove is that courts do not always respond right away to violations of the Constitution. Nevertheless, courts can repair failures, as was done with *Endo*, which limited damage done by *Korematsu*. *Endo* was a timely check on Endo's individual case, and retroactively assured each Japanese-American the protection of the Constitution against internment without charge, while setting the ground for the possibility of reparation as a matter of law. Most of all, *Hirabayashi* and *Korematsu* instruct us about the normal (usual) conduct of the government in wartime, letting us imagine what the situation would be like without judicial independence.

Unlike *Endo* in which the Court examined and contested the government's claims of military necessity, *Hirabayashi*'s and *Korematsu*'s decisions illustrate "judicial reluctance," i.e. "the reluctance of courts to decide a case against the government on an issue of national security during a war."[131] The rulings were both grounded on the Court's acceptance of military representations as to the necessity for confinement. But as I underlined it in the

[131] Rehnquist (1998), p. 221.

preceding section, abuses of power and attempts to legitimize them go hand in hand; and as we saw with Shklar in chapter II, military necessity invariably comes as an "excuse"[132] for executive violations of rights, while very few cases in history actually involved dire necessity. The Japanese Internment cases clearly fall under the category of unjustified violations of civil liberty, as was ultimately acknowledged in 1984 when Korematsu came back before the courts and had the 1944 ruling overturned.[133] Hence *Hirabayashi* and *Korematsu* show that government inherently tends to favor order at the expense of freedom, and lends itself to the Jack Bauer Syndrome, as it considers that constitutional violations may be unavoidable to preserve the state's safety.

Furthermore, *Hirabayashi* and *Korematsu* indicate, in counterpoint, that given the government's natural tendency to favor order at the expense of freedom, and the state officials' proclivity to abuse power, the absence of judicial independence would amount to a slippery slope to tyranny. For the objection to the Watchful Citizenry Argument shows that in situations in which the government is authorized by Congress and fervently supported by the public, nothing else but courts can impede constitutional violations. And the Argument from the M.O. points at the reliability of the judiciary in its tyranny-preventing task. Since the judiciary is the pivot of the rule of law, its absence would annul a key safeguard against arbitrariness, tantamount to handing a carte blanche to the government.

Without judicial independence, the protection of individuals' rights is up to the governing power, and thus extremely vulnerable to violations. Peter Watkins illustrates in his faux documentary *Punishment Park* how the absence of judicial independence and would affect war time, for the film takes place (and was made) in 1971, while the U.S. is at war with Viet Nam. Dissenting youth are tried before mock tribunals claiming that constitutional rights do not apply to them since they betrayed their country. They are then sent to concentration

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[132] Shklar (1993), pp. 47-8.
[133] *Korematsu v. United States*, 584 F. Supp. 1406 (1984).

camps called "Punishment Parks," located in the Californian desert, where they have three days to reach the American flag without water and with police troops chasing them in SUVs. They are told that if they successfully demonstrate their love of the country by reaching the flag on time, they will be released. While most of the young "convicts" refuse to play by the rules and are killed, some of them do manage to reach the flag at the end of the third day, but are welcomed by rifles and guns. The film offers a neat division between the individuals (dissenting minority), the judiciary (mock civil courts in military tents) and the executive force (police and military), showing that without the political independence of the courts, there are only two camps left: the weak and the powerful, the oppressors and the oppressed.[134]

Hence judicial independence is not an absolute guarantee of protection, but its absence *is* a guarantee of arbitrariness. Civil liberty would be jeopardized and everything would go downhill without an independent judiciary to protect citizens from abuses of power. Indeed power corrupts; more precisely, individuals who exercise power tend to abuse it, falling subject to the Jack Bauer Syndrome. Courts cannot prevent all individuals entrusted with power from tyrannizing over other individuals, but they can step in and check many abuses of power, thereby hindering the normalization and generalization of the Jack Bauer Syndrome to the entire executive branch. The judiciary is hence the fittest agent for meeting the worst-result principle, which demands that power be so organized as to minimize the chances that executive officials abuse their power and tyrannize over individuals.

[134] Peter Watkins' own interpretation of his film is different than mine. He claims that *Punishment Park* is a metaphor of what was going on in the U.S. in the nineteen-sixties, viz. the violent repression of student pacifist demonstrations by the police on American campuses and in the streets. I am only interested in its conceptual aspect of thought-experiment.

In conclusion, judicial independence is the most reliable instrument to meet the worst-result norm that prescribes minimizing chances of governmental criminality and protecting against violations of individuals' fundamental liberties. This mission assigned by the worst-result principle is especially urgent in times of war, when national security becomes the state's priority. Historical analysis suggests that the judiciary can be effective in checking the executive in wartime, and that its absence would amount to a carte blanche given to the government. Indeed, basic rights are most at risk when the President, Congress and the public opinion all consider constitutional violations legitimate for the sake of the state. In this sort of cases, it clearly appears that only courts are fit for the task of damage control. Hence the possibility of individuals initiating claims of constitutional violations in court is a central element in the liberal project of safeguarding civil liberty.

Conclusion

History and experience suggest that Montesquieu's institutional solution was insufficient to safeguard freedoms. The danger of micro-level abuses of power from agents of government, as Shklar argues, cannot be ignored, nor resolved in the moment that the institutions are designed. Constant control of the behavior of executive agents is required, and an independent judiciary seems an indispensable institution for this task. In spite of its imperfections, it appears as the most reliable instrument to meet the worst-result principle that prescribes minimizing chances of governmental criminality and safeguarding individuals' fundamental liberties.

As we saw in the third chapter, Unger rightly points at the importance of citizen involvement in the political decision-making. Well educated and well informed citizens, eager to participate in the political decision-makings, contribute to preventing the worst, because such a citizenry enhance transparency in the running of the state and thus diminish the chances of abusive state power. Yet an active citizenry is not reliable as the central mechanism of defense against abusive power. Indeed, a mobilized people may tyrannize over individuals, so that an independent judiciary is the best means against such threat.

In times of war, when the state favors national security at the expense of freedom, courts are indispensable, and history shows that they are anything but a laissez-passer for the executive. Therefore, the worst-result principle well understood calls for both an active citizenry and an independent judiciary. An independent judiciary with checking powers is the most reliable to protect from micro-level abuses of power and local violations of liberties.

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