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Liberty in the Political Institutions of the 21st Century

Introduction

Once upon a time, there was a republic with an established constitutional government.

At a time when most of humanity was living under ineffectual laws, the institutions of this republic allowed its people the enjoyment of property rights and freedom of contract.[1]

The republic's foreign policy was seen internally and externally (except for some of its closest neighbors that suffered the brunt of its might) as mainly motivated by self-defense concerns. Although during the last century or so of its existence this republic became a world power, its political institutions were specially designed to address local issues and to produce equilibrium between the republic's political factions.

The powers to propose and veto legislation and the power of criminal prosecution on behalf of the state granted to a special class of magistrates, the tribunes, are good examples of the compromises made to accommodate confronting factions in the design of their political institutions.[2]

Why did this republic in a relatively short time come to be seen not only by its enemies but also by a significant portion of its people as an autocracy and an imperial power? Why were the state law enforcement agents perceived as politically motivated in their actions, putting in jeopardy a tradition of respect for individual rights?

I am talking, of course, about the Roman republic.

[1]Incidentally, that is why citizenship enfranchisement became a big issue to them; in order to benefit from their (relatively) benign laws, aliens living under the republic used to press for enfranchisement. Although history attests that, at one time, all citizens, even among the most prestigious families in the republic, were foreigners, the traditions and fragile political equilibrium always stood in the way of a clear policy on that regard. But that did not prevent massive enfranchisements and economic integration on a scale never seen before by mankind.

[2]The tribunes were not technically magistrates, but an institution created by the *Plebs* (Gruen, 1974, p. 180).

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Overview

This paper has three major parts. The first is a brief history of the crisis of the Roman republic from a special and limited perspective, the second part is an analysis of some modern political institutions, and the third part is a conclusion about those institutions as enlightened by the given historical reference.

With the first part my intention is to present a historical reference of the abuse of criminal prosecution by state agents with political motivation, the attempts to reform it, the failure of the reforms, and its importance in the demise of the Roman republic. The second part evaluates the modern institution of criminal prosecution in its constitutional contexts and some implications of the politicization of public prosecution. The last part is my conclusion.

Let's start with the historical account.

1 – Brief Account of the Crisis of the Roman Republic

The peak of Roman republican history was achieved with the total victory of the consul Marius against the *Cimbrii* and the *Teutones* at the battle of *Vercellae* (July, 101 BC) (Gruen, 1968, p. 179).

Rome was already the master of the Mediterranean world and no outside power was strong enough to pose a military threat. Soon after that war, the enfranchisement of the Italian allies, possible through the offices of the tribune Livius Drusus, was frustrated by his murder in 91 BC. The Civil War began, followed (89 BC) by the first war against Mithridates, an event in itself that could be traced to the internal strife, since the invasion of the Asian province by Mithridates was a consequence of a Marian provocation (Luce, 1970, p. 387).

As we will see, after 50 years of turbulence, starting with these events, the Roman republic no longer existed. The end of the Roman republic cannot be explained by a single cause, however. If it is considered that the Republic ended when Julius Caesar crossed the Rubicon (49 BC), a fairly accepted mark, and if it is agreed that his action was essentially an attempt to avoid politically motivated legal prosecution, then, the political use (or abuse, if you will), of the prosecutorial powers during the Roman republic was directly responsible for its fall.

What this paper suggests is that the prosecutorial powers of the tribunes were frequently abused for political reasons. I want to suggest that Sulla's settlement in 80 BC, preventing those magistrates from having a future political career, was a good measure in order to keep justice, peace and progress in Rome; in fact, I want to suggest that it was such a good measure that its adoption should be considered in modern western democracies if the goals of justice, peace and progress are to be pursued.

Let's look now how Roman criminal law used to work. Roman criminal law may be classified broadly into (a) the domestic jurisdiction, (b) crimes against the person, (c) crimes against property such as theft and swindling (*stellionatus*), and (d) crimes against the State in the secular sense.

Criminal law related with crimes against the state dealt with different crimes: (a) treason and sedition (*vis*), (b) crimes which could only be committed by persons holding or striving for office,

such as extortion, embezzlement of public funds or electoral corruption, (c) counterfeiting coinage, and (d) with offences against the public food supply (Robinson, 1995, p. 74).

Although private individuals could legally act as prosecutors in cases related with crimes against the state, those crimes were the quintessential ground for the exercise of prosecutorial powers by the tribunes, and we will see that most of the politically motivated charges were charges of treason (most commonly charges of *maiestas*). These charges were usually brought to political trials if not for any other reason, because it was typically difficult to classify some action as being treacherous or not under Roman law; the crime of *Maiestas*, for instance, was defined as "damaging the majesty of the Roman people" (Gruen, 1974, p. 263).

Charges of *perduellio* were also very common during the republic. Individuals condemned of that crime would theoretically face the death penalty, but accusations of *perduellio* were so mixed with politics that the penalty was usually exile (Robinso, 1995, p. 78).

One thing that strikes any person studying the period of the Roman republic before, during and shortly after Sulla's restoration is the frequency and regularity with which criminal prosecution was utilized as a political weapon (Gruen, 1968, p. 6). As political struggles were transformed into judicial disputes, it is easy to see why an important part of Sulla's program was an attempt to curb this political use of the courts. It is also easy to understand why the political elite readily agreed to lift those curbs after his death.

But, what was a political trial? According to Erich Gruen:

> A Political Trial may be defined independently of the charges involved: a criminal prosecution motivated by political purposes. In addition to treason, common charges were extortion, electoral bribery, judicial corruption, theft of public funds, and even homicide (Gruen, 1968, p. 6).

The political use of the courts, as we will see, could serve several functions. Still according to Gruen:

> Criminal prosecutions provided an avenue for young men to make a name at the bar and to launch a public career. They also served to air and often to aggravate personal rivalries. On occasion, constitutional and legal issues of the greatest significance turned on the outcome of a prosecution, and finally, the criminal trial was a common vehicle for factional struggles within the governing class, or indeed a means whereby to attack that class itself (Gruen, 1968, p. 7).

This paper will focus on the criminal causes proposed by tribunes and not on political trials in general; those are mentioned in this paper only to provide a broader picture to the issue in question. The hypothesis that I am trying to present here is based on an analogy between the modern public prosecutors and the Tribunes of the ancient Roman Republic. That analogy, however, is an imperfect one; there were no public prosecutors in Rome as we know them today. The very boundaries between civil and criminal cases are not easy to grasp. As Andrew Lintott put it:

> There was in any case no public prosecutor in Rome: the gap was filled in varying ways according to the procedure used – by magistrates such as the tribune or the *aedile* in an assembly, by wronged parties or their relatives, or, in the majority of the *Quaestiones Perpetuae* and certain trials before *Recuperatores*, where it was permitted to bring actions on behalf of the

> Roman people or of other injured individuals, by private citizens (Lintott, 1999a, p. 148).

For the purposes of this paper, however, I think that the analogy is valid and can indeed illuminate us on the adequate constitutional designs required to have criminal prosecution that is not driven by political motivation.

In 149 BC the *Lex Calpurnia* established the first permanent courts reported in Roman history, under which, panels of senators acted as sworn jurors to deal with claims of provincial extortion.

> Thereafter, both the senatorial special commissions and also the jurisdiction of the assemblies began in their turn to be superseded by the creation of *Quaestiones Perpetuae*, permanent jury courts, whose structure, if not purpose, was modeled somewhat on the *lex Calpurnia* (Robinson, 1995, p. 1).

During the dictatorship of Sulla (82-81 BC), a system of permanent, standing jury courts was established; once competent jury courts were established, trials were not taken to the assemblies anymore. During the late republic, the jury panels, originally composed of senators, were transferred to the equestrians under C. Gracchus legislation, transferred back to the senators under Sulla, who doubled the size of the Senate with that purpose, and finally in 70 BC under a *lex Aurelia*, it was established that the juries for the *Quaestiones Perpetuae* would be manned by senators, equestrians and *tribuni aerarii*, an arrangement that lasted until the end of the republic.

In his book *The Magistrates of the Roman Republic*, Professor T. Robert S. Broughton had listed all the historical references to Sulla's law related to the tribunes and summarized the topic as follows: "The Tribunician veto was limited, the right to initiate legislation removed, and also the right to hold further office" (Broughton, 1951, p. 75).[3]

It is not difficult to understand how Sulla came to the conclusion that the use of the prosecutorial powers of the tribunate to foster future public careers should be limited. We can apply the Occam's razor and do not hypothesize more than the minimum required: he was a victim himself. His return from the governorship of *Cappadocia* in 95 B.C. brought the inevitable *repetundae* prosecution (Gruen, 1968, p. 198). The prosecutor, C. Marcius Censorinus, failed in his handling of the case and the charges were dropped. According to Plutarch (*Sulla*, 5.6), though evidences were lacking, the maneuver sufficed to plant suspicions, including rumors of bribery by *Mithridates* and as a consequence, Sulla's career was delayed for another 7 years.[4]

[3]Professor Broughton lists all the original sources to Sulla's law related to the Tribunes as follows: The Tribunician veto was limited, the right to initiate legislation removed, and also the right to hold further office. Cicero – *On Laws* - Book 3, 22; Cicero – *Against Verres* - Books 2, 122 and 155; Cluent. 110; Julius Caesar – *The Civil War* –Book 1, 5 and 7; Sallustus, *Hist*. 3.48.8 and 12M; Dionysius of Halicarnassus – 5.77.4; Vell. 2.30.4; Ascon. 67,78,81C; Plutarch – Caesar – 4.2; Suetonius - Julius Ceasar – 5; Appian – *The Civil Wars* – Book 1, 100 and Book 2, 29; Livy Per. 89; Auct. Vir. Ill. 75.11; cf. Cic. Verres. 2.1.122; Tull. 38; Ps.-Ascon. 255 Stangl.

[4]The events that preceded Sulla's controversial actions during the year 88 B.C. can be well understood if we notice that the tribune P. Sulpicius Rufus unscrupulously employed bands of men to precipitate violence in the streets and browbeat the assembly into transferring the Mithridatic command from Sulla

We can understand why Sulla, while striping the tribunes of the power to propose laws and to veto in the assemblies and to pursue other magistracies, left them their prosecutorial powers. We can reasonably assume that for Sulla a tribune without political ambitions would act more or less like the judges in the 90's and that the prosecutors without their power to propose legislation or interpose veto would focus on their core constitutional mission, i.e. to care for the observance of the law. This part of Sulla's reform must be seen as part of his broader goal that the courts were to be removed altogether from the realm of politics (Gruen, 1968, p. 255).

In order to evaluate Sulla's reforms, we should use his own criterion: were the criminal procedures free from politics, with jurors concerned with justice and the security of the community? The first test was the prosecution (in 80 BC) against L. Cornelius Chrsysogonus (an important Sulla freedman), who was accused of making a fortune during the proscriptions. He was convicted (with the assistance of the 26 year-old Cicero), proving that, under the new constitution, political connections would not suffice to secure an acquittal (Gruen, 1968, p. 265).

In 75 BC, however, only three years after Sulla's death, the law imposing a ban on tribunes to hold further office was removed with the support of a majority of Senators (Keaveney, 2005, p. 186). And in 70 BC, during the consulship of Pompeius and Crassus, the *tribunicia potestas* were restored in full; ironically, a measure advocated by Julius Caesar (Gruen, 1974, pp. 25, 28).

The most emblematic case of abuse of the tribunate after its restoration is the case of Clodius. Clodius is the same Roman aristocrat that caused Julius Caesar to divorce *Aurelia* after entering Caesar's house disguised as a flute girl during a religious ceremony only for women. After avoiding punishment for that misdemeanor, he managed to be adopted by a plebeian family and was elected as tribune for the year 57 BC. Then, after seizing Cicero's house, destroying it and transforming part of the lot into a park

to Marius (Gruen, 1968, p. 226). At that point, Sulla resorted to the use of force and the history is known. After Sulla's march on Rome, twelve of his leading enemies were exiled, some of them killed, Sulpicius was slain (*Appian*, BC, 1.60 and *Cic. Brutus*, 168). Order restored, and his command secured, Sulla retreated from the city and started his arrangements for the East expedition. Already under the consulship of Cinna, soon before his departure to the war against Mithridates, however, a tribune, M. Vergelius, indicted Sulla before the people (*Cic. Brutus*, 179), most likely for the slaying of Sulpicius and the *Marianii* (Gruen, 1968, p. 229) with the clear objective of, once more, trying to deprive him from his imperium. Apparently, his popularity and the serious situation abroad conveyed the people to give no support to the writ and Sulla was able to pay no attention to the prosecutor and went East (Keaveney, 2005, p. 63). The victory of Cinna and the young Marius for the consulship in late 87 BC entailed a bloodbath, with revenge taken against Sulla's supporters, among them six ex-consuls were slain (the actual murderer of Cn. Octavious was C. Marcius Censorinus, the prosecutor of Sulla in 95 BC, who proudly put the severed head of Octavius to public display). Even when formal trial was held, like the prosecution before the people by the tribune M. Marius Gratianus (nephew by birth and son by adoption of C. Marius) against the proconsuls Q. Catulus and L. Merula (who committed suicide before the verdict was delivered), according to Appian (*Appian*, BC, 1.74) the trials were a mere screen of sham legality (Gruen, 1968, p. 233).

and having the remaining incorporated to his own home (they were neighbors) and sending Cicero to exile, Clodius tried to do the same with Pompey's home amid so great havoc and street violence that all government institutions in the Forum, including the Law courts, had to be suspended (Gruen, 1974, p. 97).[5]

One crucial feature of Roman republican institutions that we must keep in mind when we study the history of the late republic, one that explains why political violence was rampant, is that there was no gendarmerie. A law enforcement armed force was something that only appeared later in the Principate with the urban cohorts (Lintott, 1999b, p. xiv). After Clodius's death, the rioting between his supporters and Milo's was only interrupted when Cnaeus Pompeius was called to restore order, something that he did by bringing legionaries into the city.

As already mentioned, the standing jury courts were also established by Sulla during his dictatorship (82-81 BC). Before that, criminal cases were brought before assemblies (either *comitia centuriata* or *concilium plebis*); no doubt another institutional change meant by Sulla to avoid mingling politics with judicial decisions (Robinsom 1995, p. 1).

That piece of Sulla's constitution, the standing juries for criminal cases, has remained in use until today, while the limitation for tribunes to seek higher office was abolished. It is an important aspect to be considered. The preservation of standing juries for criminal offenses was of no minor consequence, after all, as Erich Gruen put it "popular hostility did not require proof," and "popular enthusiasm is not always governed by reason" (Gruen, 1968, pp. 145, 151).

We will see that after the establishment of permanent criminal courts, complaints were often made not against the partiality of the judges but the opposite—their contempt for the senatorial misuses of the courts. After the prosecution of the remnants of Saturninus's rebellion, during the 90's, for instance, not a single case of *Maiestas* (treason) received a condemnatory verdict by the courts (Gruen, 1968, p. 204), producing a growing desire among the aristocracy to reform the courts.[6]

It is time now to focus our attention on the events directly connected with the

[5]The most common modality of prosecution by the tribunes was to propose a fine in an assembly, either from the tribune's own initiative or he could inflict a fine prescribed in a statute. According to Andrew Lintott, however, the original form of coercion by means of financial penalty available to a tribune was the consecration of property (*consecratio bonorum*), attested on a few occasions in the later Republic (*Livy*, 43.16.10; Cic. Dom. 123; Pliny, HN 7.144) (Lintott, 1999a, p. 123). (This is what Clodius did with Cicero's house and attempted to do with Pompey's. Since at that time the prosecutions were presented to the assembly as laws, the actions of Clodius against Cicero took the form of a law, a form of *interdictio*, made possible by the implicit admission of guilt through self-exile (forced by the very real risk of violence against his life as insufflated by Clodius) (Gruen, 1974, p. 246).

[6]The charges of *maiestas* against the tribunes *C. Manilius* and *C. Cornelius*, an ex-*quaestor* of *Pompeius*, in 65 BC, with their opposite outcomes, proved once more, according to Gruen, that "whatever the political machinations behind the scenes, Roman jurors might still render verdicts on the merits of the case" (Grue, 1974, p. 265), a fact that offered no consolation to persons unjustly accused that had their careers delayed or compromised for good.

end of the republic. When we try to understand social events of great magnitude such as the end of the Roman republic, it is common to attribute them to large forces and not to give the same value to individuals or chance. The activities of C. Scribonius Curio as a tribune during the year 50 BC, however, are directly related to the unleash of a chain of events leading to the Civil War. His later activities in favor of Julius Caesar may blur our understanding of how much Curio was playing an agenda of his own with his manipulations of the antagonism between Caesar and Pompeius Magnus and the Catonian and Conservative factions in the Senate to catastrophic results (Gruen, 1974, p. 471).

His proposals, at first glance, were typical of an active and demagogic tribune: agrarian bills, a grain law, road-building projects, and restrictions on luxury, they were all too familiar measures. His political maneuvers, however, had a great impact on the future events leading to the end of the Republic (Gruen, 1974, p. 473). From our perspective today it is difficult to understand why the termination of Caesar's command in Gaul or his right to be a candidate in the consular elections while retaining his command in Gaul could be the central issue that generated the Civil War. Caesar's command was to expire before the 49 BC elections. His prerogative to a *ratio absentis* was not, therefore, necessary anymore for those elections (since at that time, his command would have expired). Caesar did not |run for the 50 BC elections, though, and the focus of the discussions during the months before the Civil War was whether or not he would be allowed to retain his command and run *in absentia* for the 49 BC elections. As stated by Professor Gruen: "Having abstained from consular candidacy in 50, Caesar now sought to have the *ratio absentis* extended beyond the point for which it was first intended" (Gruen, 1974, p. 477).

In order to reach a compromise with all parties involved, Pompeius suggested an extension of Caesar's command in Gaul for seven additional months, so that he could run for election *in absentia*, but Julius Caesar had to leave Gaul soon after the election in order not to be at the same time consul elected and provincial *imperator*. That seemed a reasonable offer, but Curio, most likely seeing in that proposal a realignment of political forces that would jeopardize his own prospects, suddenly abandoned his legislative agenda and initiated a furious attack on the proposal and on Pompeius, personally.

It is not our purpose here to elaborate further on those events. Suffice to notice that if Caesar was not interested in a compromise, as some scholars claim, it is difficult to understand why during those months he consented to supply two legions of the Gallic Army to reinforce the Parthian frontier. Curio successfully blocked Pompey's proposal and created an effervesced political climate (Gruen, 1974, p. 481).

Later, in December, Curio gained approval of the senate[7] for a proposal that both proconsuls (Caesar and Pompeius M.) should resign their commissions and discharge their armies. That proposal, however, represented the political end of the Catonian and the Conservative factions in Roman politics and, consequently, the consul Marcellus refused to follow the senate majority arguing that according to the Roman constitution, a *Senatus Consultum* was advisory counsel, not legally binding, and that he as consul

[7]By the large margin of 370 against 22.

elected was responsible for the defense of Rome. Finally, he marched outside the *pomerium* to start defensive measures against Caesar, putting Pompeius at head of the two legions available in Italy. He appointed a new commander for the Gallic army, stating that if Caesar did not relinquish his command he should be considered a brigand (Gruen, 1974, p. 487). Requiring no further pretexts, in January 49 BC, Caesar crossed the Rubicon.

Since all the political discussions during the last months of 50 BC were focused on the possibility of Caesar running for the consulship in 49 BC while keeping the command in Gaul, did Caesar have a compelling reason to insist on that prerogative? The majority of the scholarly opinion is clear: Caesar could not afford to return to Rome as a *privatus*, for he would be immediately prosecuted and eliminated from political life, as attested by his own words, quoted by Assinius Pollio (*Suetonius*, *Iul*, 23). Cato had vowed for a long time that he would prosecute the proconsul as soon as he returned, something that Cato surely would do (as he did in 58 B.C) through a tribune and not directly (Gruen, 1974, p. 494).

It is always difficult to understand the events that lead to a war, the moment when political and legal considerations, which had until then constrained the actors, are disregarded. One of the possible lessons to be learned from the end of Roman republic is that even against the interests of a majority of the agents; chance and irrational or, at least, short-sighted attitudes of few individuals can lead to the destruction of the Civil (Gruen, 1974, p. 507). As long as Caesar remained a proconsul, he was immune from prosecution, but his pro-consular *imperium* would not last forever. The menace of criminal prosecution was immense. Caesar and Pompey faced a strong reaction from the opposition interruptedly since 59 BC. Because the proconsuls Caesar and Pompey were protected by the immunity conferred by their *imperia* (Gruen, 1974, p. 101), I would like to suggest that we trace this menace through the record of political trials against their supporters, and there were many.

It is not that attempts against Caesar's immunity were not reported. As early as 58 BC, the tribune L. Antistius brought an accusation of *ambitu* (electoral corruption) against Caesar. Caesar's enemies were aware that a man absent in the service of the state was not subject to trial, but their objective was not to get a conviction but to raise doubts about his integrity (Gruen, 1974, p. 292). During 50 BC, the equilibrium of political power was so fragile that the activities of one tribune alone could be sufficient to tip the balance of power. This tribune was Curio.

To conclude this brief historical account, as said, in January 49 BC, Julius Caesar crossed the Rubicon, a ruinous civil war endured for more than 20 years, at its conclusion, Rome had become a monarchy (Gruen, 1974, p. 1). Now let's see what Rome has to teach us.

In order to make some sense of these notes, it is important to have in mind that, first, I am dealing in this paper only with the prosecutions in name of the state by the tribunes. Second, Praetors used to preside over the *Quaestiones Perpetuae* (Gruen, 1974, p. 163). Third, although any adult male citizen could request permission to prosecute someone from the president of the relevant court (in criminal cases it was usually a *Preator*), the cases of crime against the state were

usually brought to courts by the Tribunes (Robinson, 1995, p. 4).

It is easy to understand why. The answer is that there were intrinsic limits to the abuse of lawsuits as initiated by private individuals on their own behalf. Those intrinsic limits were missed when cases were brought to the courts in name of the collective. According to the *Lex Remmia de Calumniatoribus* (80 BC) concerning procedure in the *Quaestiones*, the accuser had to take the oath of calumny that his prosecution was in good faith (Robinson, 1995, p. 107). This institution, brought to modern systems of law through the Cannon Law, is an example of the limits on prosecution for private individuals, which a public persecutor is not constrained from.

2 – Evaluating the Modern Institution of Public Persecution

Since the historical references of politically motivated abuse by the tribunes of their prosecutorial powers were not against businesspeople during the Roman republic, we focused our attention on cases brought to courts against magistrates and other political figures. It does not imply that there were no cases against businesspeople, only that we do not know about them.

Currently, the concern is with the deleterious consequences of cases against businesspeople brought to courts by public attorneys with the objective of procuring political advantages for themselves. As in the final days of the Roman republic, when the political abuse of prosecutorial powers was a major threat to political stability, today it is a major threat to economic performance, to the rule of law and to individual rights. In this paper I have presented some examples of politically motivated prosecutions against magistrates (and other political figures) during the Roman republic. Let's turn now to cases of prosecution against business people today.

It is important, at this point, however, to stress that the claim presented in this paper is not, in any respect, a claim to curb prosecutorial powers, neither against business, nor against government. It is understood that these powers are important checks for the potential abuses of government officials and groups of interests. The claim is only to eliminate some incentives present in the current constitutional design of public prosecutorial agencies in most Western countries that may induce or, at the very least, may not prevent, politically motivated abuse of prosecutorial powers.

Institutions in general, political institutions among them, do evolve and grow as a result of history, experience, culture and other forces beyond the constitutional stage; more so, we do not expect constitutions to be "static." That is why institutional study goes beyond the origin of the constitution. However, if we see constitutional choice as being about a broad set of principles, we can think about all the other political institutions as derived from or, at least, authorized by the constitution, and perhaps we may talk about political institutions in general referring to their constitutional ethos. The theory of constitutions, the central focus of Public Choice, raises questions about how government may be constrained and how government should be constrained such as the following (from Buchanan, 1999, p. 52):

1) What should governments be allowed to do?

2) What is the appropriate sphere of polit-

ical action?

3) How large a share of the national product should be available for political uses?

4) What sort of decision-making structures and rules should be adopted at the constitutional stage?

5) Under what conditions and to what extent should individuals be enfranchised?

How can we frame these questions in relation to our selected subject in view of the Roman experience?

What should governments be allowed to do?

In this case, what can be done to limit criminal prosecution by government agents motivated by political self-interest?

There are many other reflections to be made about the topic of the perverse effects of misguided criminal prosecution against individuals. One topic of major relevance is the increasing number of actions that have been criminalized in western countries during the last fifty years. It is the increasing criminalization of acts commonly associated with business practice that creates the opportunity for the political exploitation of their prosecution. When an environmental issue is no more a tort case, when changes in gas prices are perceived as price gouges, when barely any transaction or business practice can be charged as securities fraud, no wonder there are so many criminal cases against businesspeople.

Another related topic is that they are unaccountable, there is a lack of personal liability and, in most countries, there is a lack of governmental liability due to ill-conceived cases sent to courts by public prosecutors, and neither individual prosecutors nor governments have penalties to restrain themselves in order to avoid ill-informed cases.

But the answer seems clear: any constitutional improvement made in order to diminish the opportunities for personal political gains by individuals entitled to initiate criminal prosecution in name of the collectivity would be advantageous to the cause of justice.

What is the appropriate sphere of political action?

Related to our topic, this question can be understood in two ways. First, to what extent, if any, political concerns could be a legitimate basis for criminal prosecution, and, second, in a broader understanding, when the political body, represented by its judicial branch, should be allowed to impose limits on individual's behavior.

The use of coercion by the government has been increasingly tolerated worldwide, either to impose a leftist or a conservative agenda, and always allegedly in order to "do good." Since the beginning of the Progressive Era, the United States has adopted more and more statutes as a major source of law, creating more and more positive rights and entitlements, generating more and more recourses to the judiciary without the natural limitations imposed by the risks of adverse decisions under the common law. It can be argued that the political institutions today do not have the defense mechanisms necessary to check the legislative branch to criminalize behaviors, and that the institutions do not have the

necessary instruments to prevent the executive branch from increasing in order to face those new "crimes." Eventually, it can be argued, the individuals will be powerless to confront the government if the political agents can accuse, in the name of the state, virtually anyone of any crime.

A last example of a related topic is the analysis of some limitations of the cases that public attorneys are entitled to pursue. Any case brought to the courts is a conflict in which individuals are giving up the power to solve by themselves and recurring to the state to decide. When individuals sue each other, they usually evaluate the costs and benefits of their actions carefully since they bear the consequences. Most cases brought to the courts by public prosecutors are cases that the individuals directly affected do not think it is economical to pursue in the courts. So, the broad variety of cases that public prosecutors in general can present in court is, per se, a factor that increases the spheres of our life subject to collective decision.

There is no simple answer to the question about what the appropriate sphere of political action is; the short answer is nothing more and nothing less than what the government is required to perform, essential duties of justice administration, protection of the individuals and their properties against domestic or foreign foes and the necessary collection of revenue to fund those activities. A more elaborate reply will be needed in different contexts in which the question is raised.

A good principle, however, to evaluate these limits is offered by the subsidiary principle: anything state governments can do, the federal government should not do; anything local governments can do, state governments should not do; and anything individuals can do, local governments should not do.

How large a share of the national product should be available for political uses?

At least after 1914 we have seen a steady increase in the proportion of GNP devoted to public spending worldwide. One aspect of this process not easily perceived, however, is how much of private spending and investment is publicly mandated in the form of regulations. It is reasonable to assume that the increasing number of behaviors regulated by law would force a correspondent increase in publicly mandated actions.

The share of the GNP that is spent or invested as a consequence of judicial decisions is just a subgroup of the publicly mandated spending referred above. Since people tend to act rationally, we can safely assume that the very existence of regulation and the risk of facing legal action is enough to exercise great influence on the individuals' behavior, being pointless for our purposes to try to measure the magnitude of the subgroup that we are dealing with.

For our purposes it is sufficient to understand that any spending or investment decision publicly mandated and complied to by the economic agents (out of expediency to avoid legal action or as a consequence of some legal enforcement measure) tends to distort supply and demand, since it is unlikely that complied behaviors would be actualized otherwise without coercion; influencing prices in a way that diminishes maximum economic efficiency and therefore affects the production of wealth. Low economic performance in Western countries results not only from direct government economic

activity but also from increasing regulation limiting individual options. The use and abuse of criminal action against economic agents is just part of this collectivization of decision making in our societies.

What sort of decision-making structures and rules should be adopted at the constitutional stage?

The wisdom of the American Founding Fathers allowed them to design a structure of representative federal government with political power divided between different branches and levels of government. The "each man one vote" formula enhanced by vote per districts and the accountability brought by the system of political representation by direct election to a number of different political positions have secured a prolonged democratic experience for the United States. However, neither there nor in other countries where the formula of constitutional limited government has been imperfectly adapted, these institutions have managed to limit effectively the government as measured by the size of public spending as a percentage of GNP.

Let's look now for other experiences in addition to the American one. For instance, one possible reform in most Latin American countries, such as Brazil, is to replace appointed public attorneys with civil servant tenures by elected public attorneys with term limits. Such public attorneys should be accountable, provisions should be made for (i) penalizing them for not sharing evidence, (ii) making the state responsible for losses resulting from frivolous prosecution, and (iii) making the attorneys themselves personally responsible for their actions as it is in any other case of agency. These reforms would increase immensely the accountability of these public officials and curb part of the unchecked power of that branch of government. Since, in the Brazilian example, the current limit of constitutional constraints on government is inferior to the limit reached in the United States, it is possible to follow the American example with a better representative and limited government.

But even in the United States new forms of decision-making structures are necessary in order to enhance legitimacy, accountability and limited government. Is there any system the United States should imitate? What could be the new institutional arrangements then? History is one place to look for inspiration and the thesis presented in this paper is just an example.

For instance, a broader claim could be made that the traditional separation of powers in three branches, plus the different levels of state action resulting from a federal form of government is now insufficient to impose the checks and balances necessary to prevent further encroachments of government in the sphere of individual action. If this is so, then the establishment of other branches could be an improvement, a change in the right direction. An independent (from the other branches) public attorney's office at each level of government but accountable to the voters could be a positive step.

The idea of imposing a limitation to pursue further political careers, the issue that doomed Rome as suggested by this paper, could be understood as part of a broader effort to design new checks on governmental action.

Under what conditions and to what extent should individuals be enfranchised?

In relation to our topic we could understand this question as asking who

should have the prerogative to choose the individuals to whom the State will grant powers of criminal prosecution with the purpose of defending law and justice. It is undoubtedly a matter of great importance.

There are basically three ways of filling the position of public attorneys to be considered: they can be elected by the public in general (as is the case in most of the United States), they may be appointed by others officials, being those officials themselves elected or not (as in Rhode Island and Delaware) (Gordon and Huber, 2002, pp. 334-351, 349), or they may be employed as tenured civil servants (as in Brazil and most of Latin America). The extent to which public attorneys are accountable to the public is an essential component of democratic governance and, of course, the directly elected ones are more accountable than the appointed by elected officials, and those ones are more accountable than tenured civil servants.

What remains to be seen, however, is the measure in which the election of public attorneys could, at the same time, increase their accountability but diminish their interest in pursuing just outcomes. To answer this question, Gordon and Huber (2002) authors developed a model to analyze the electoral incentives of elected criminal prosecutors to seek Justice, since they have an interest in being reelected. Although not entirely rosy, part of their conclusion is that:

> The model of the relationship between the prosecutor and the public we have presented reveals that voters can use the incentive of reelection to induce the prosecutor to learn the truth about individual cases, helping to mitigate against the problem of wrongful convictions and acquittals and thereby promoting justice (Gordon and Huber, 2002, p. 350)

It seems based on their conclusion that there is not a problem for the cause of justice with the election or reelection, for that matter, of criminal prosecutors to their offices.[8]

Better accountability and no evidence of damage to cause of justice seem to suggest that the voters should keep the right to fill the public attorneys' positions at each level of government, the system adopted in most American states being preferable to the other systems mentioned above. Nonetheless, it seems, based on the historical evidences presented and the anecdotal evidence reported next, that there is a risk to justice, with all the deleterious consequences already mentioned, if public persecutors are allowed to pursue further public offices.

Next, there are a few current examples of the impact of allegedly politically motivated actions on business. On March 24, 2006 under the title "The Spitzer Saving Plan", *WSJ* editors wrote the following about the H&R Block case:

> So rather than let a jury evaluate his charges, Mr. Spitzer is once again threatening to use his power to ruin a company before it even steps into a courtroom. Not that his accusations appear to have much to do with the law in any event.

Only to conclude:

[8]Also, their conclusion is coherent with Besley (2002, p. 2), where he stated: "Direct election of regulators, rather than appointment by elected politicians, should lead to more consumer-oriented regulatory policies." It can be argued that the role of criminal prosecutors is not the same as the role of utility regulators, but both are public officers with the power to initiate legal action against individuals, supposedly to promote justice, or in any case, to enforce the law.

> But his detachment from the struggles of working people is no excuse for launching a political attack on a law-abiding company, the main benefit of which would be to foreclose a promising avenue for low-income savers.

In the April 15, 2006 edition, the *WSJ* interviewed Hank Greenberg ("You Couldn't Build an AIG Today"), in which Mr. Greenberg explains that today in America: "Overbearing regulators, new corporate governance rules, protectionism, a failing tort system, and prosecutors unleashed are the obstacles to corporate greatness."

According to the text, Mr. Greenberg does not want to build another AIG and is still refusing to settle with New York Attorney General Eliot Spitzer, whose political ambition—expressed here in a *jihad* against Mr. Greenberg—put the insurance titan out of his job. Mr. Spitzer later admitted he had nothing that would allow him to bring criminal charges against Mr. Greenberg; but AIG was not about to argue. As stated in the interview, Mr. Greenberg notes that:

> New York has been worse than most [states] at allowing a climate where prosecutors create law, rather than just enforce it. The overall legal climate, and basic system of due process, "has changed dramatically."

On May 3, 2006 in her commentary "The Passion of Eliot Spitzer" in the *WSJ*, Mrs. Kimberly Strassel wrote about one of the famous cases brought to court by Mr. Eliot Spitzer, then New York's top law enforcer (and eventually democratic candidate to New York state governorship): "Mr. Grasso's legal team is digging into information that it hopes will show Mr. Spitzer brought the case solely to further his political career."

On May 16, 2006 the *WSJ* brought news that South Korean prosecutors said they would issue an indictment against Hyundai Motor Co. Chairman Chung Mong Koo for alleged corruption at the automotive titan. A move that some analysts say risks creating a leadership vacuum at a major corporation. They have investigated whether Hyundai wrongfully lobbied bureaucrats to help the company receive permits to expand facilities. Prosecutors said that one of the bureaucrats had admitted to receiving favors (including a 20 % discount on his purchase of a new sedan).

On May 18, 2006 the *WSJ* brought news about a settlement between the U.S. government and *Tenet Healthcare Corp* that will pay $21 million plus sell a hospital in order to avoid a third criminal charge from Carol Lam, the U.S. Attorney in San Diego, for allegedly paying kickbacks to doctors in exchange for patient referrals to the hospital, a charge that they denied and that two federal juries deadlocked and were unable to reach a verdict.

The heavy handed approach to corporate crimes currently in force in the U.S. can be summarized by the following quotation from the May 26, 2006 *WSJ* article "Guilty Verdicts provide 'Red Meat' to Prosecutors Chasing Corporate Crime":

> Prosecutors continue to use the threat of indictment to force companies to cooperate with investigators and to accept so-called deferred prosecution agreements. That tactic follows instructions in a controversial 2003 memo by then Deputy Attorney General Larry Thompson. The memo said federal prosecutors should consider indicting corporations if their executives and directors don't swiftly and voluntarily cooperate.

That was the case of the deal reported in the *WSJ* by Elena Cherney on May 16, 2006 between Hollinger Inc. and the office of U.S. Attorney Patrick Fitzgerald in Chicago, which formalizes the firm's cooperation with prosecutors in exchange for their agreement not to bring charges against the firm. Those charges would be related to the charges presented against a former chairman and other directors who incidentally have pleaded not guilty.

An example of how politics can be influenced by the action of a public attorney even when no prosecution is ever filed and the case discharged is the case of the three-year-long special counsel Patrick Fitzgerald's investigation on who leaked the CIA identity of Valerie Plame. As stated in the *WSJ* editorial "Frogs Aren't Marching" on June 14, 2006:

> The tragedy of this episode is that a political fight over the war in Iraq was allowed to become a criminal matter. So what we are left with is a three-year political spectacle that has kept the White House under siege during a war, weakened or pushed out of office some of its most important aides, and made liberal celebrities of Mr. Wilson and his wife. And to what public purpose? A prosecutor with more wisdom than Mr. Fitzgerald would have long ago understood he was injecting himself into a political brawl, closed his case and left the outcome to the voters.

The criminalization of an increased number of behaviors produces the *ethos* to these attacks and menaces against law-abiding individuals. According to the Mercatus Center at George Mason University as reported in the WSJ editorial "Tale of the Red Tape" on May 11, 2006:

> … from 2001 to 2006, the number of federal regulatory personnel has risen by one-third (or 66,000 more snoopers); regulatory budgets are up by 52 % after inflation, and the Federal Register–which prints all that regulatory verbiage–has climbed by more than 10,000 pages.

A good example of new criminal legislation was the May 2006 vote (389-34) by the U.S. House of Representatives to make gasoline "price gouging" a federal felony. As stated in the *WSJ* editorial for May 16, 2006 ("The Real Gas Gougers"):

> One small problem is that no one in Washington can seem to define what constitutes price gouging. Under the House legislation, the bureaucrats at the Federal Trade Commission would define a "grossly excessive" price and then, *once prosecutors charge some politically vulnerable target* [our italics], juries across the country would decide who's guilty and who's not.

As stated before, this paper's intention is not to discuss a general revamp of the institutions in charge of criminal prosecution in modern democracies. The references to more general ailments are intended only to frame our presentation. The general problems associated with the politicization of criminal prosecution were ample during the Roman republic and continue to be so nowadays. It can be accepted that a discussion about the structure of the U.S. Department of Justice, the Office of the Attorney General or the Solicitor General would not contribute to the clarification of the specific claim proposed by this paper, not that they would not deserve to be assessed. Suffice it to say that commenting about the aggrandizement of the U.S. Federal government during the twentieth century, in his 1992 book *The Politics of Justice: The Attorney General and the Making of Legal Policy*, Professor Cornell W. Clayton states:

> The impact of these developments on the

> Attorney's General Office became apparent as Presidents increasingly began to view the Department of Justice as a partisan instrument for effecting their policy agenda (Clayton, 1992, p. 4).

On page 54 of the same book, references to a supposed independence of the office of the Solicitor General both in the United States and England were dismissed as "a myth" opening the entire structure of Government litigation to scrutiny.

3 – Conclusion

A common pattern of violence during the late republic was that the demagogic leaders (called *Populares* by *Cicero*) generally operated inside the constitutional arrangements. Their favorite tool was the elected office of Tribune. They only resorted to violence when they failed to achieve their ends legally (Lintott, 1999b). Whenever they found themselves constrained by the legal limits imposed by the constitution or at risk of being outvoted in the assembly, they resorted to violence against the institutions:

> We find in ancient Rome a society whose ethos supported violence, where this could be justified by expediency, and which positively welcomed the use of force in defense of rights, and we also have two opposed visions of what was right (Lintott, 1999b, p. xviii).

There is no possible compatibility between civil society and the use of force, and the tolerance with uncivil behavior had no minor impact on the fall of the Republic. There is no other role to government more important than the protection of the citizens and the institutions themselves against violent abuse. In the end, it was the inability of the Republic to impose the rule of law under civil authority that transformed the Roman State into a Military Dictatorship.

During the Roman republic, politics and criminal courts were strongly intertwined. As early as 149 BC and more frequently in the late republic, criminal courts were used as means to settle factional disputes, personal or family feuds, to create embarrassments in order to destroy or delay opponents' careers or to launch a political or forensic career:

> Factional contexts, the broadening of the political base, the impact of foreign wars, struggle over the courts, the role of criminal trials, and the evolution of criminal law: all these elements interacted with one another at practically every significant turn (of Roman republic history) (Gruen, 1968, p. 287).

More than 100 criminal cases are reported from the Ciceronian age (60's and 50's) where politics were generally involved, and Gruen reported about fifty criminal cases with some political importance between the years 69 and 56 alone, showing that politically motivated criminal prosecutions were pervasive at that time (Gruen, 1974, pp. 3, 310).

Contrary to the position of Professor Gruen, I do think that the tribunate—as it was designed, *salvo*, while Sulla's reforms lasted—did represent a threat to the established order (Gruen, 1974, p. 24). Imperfect as it may be, the parallel suggested by this paper between the politically motivated abuse of criminal prosecutions by the Tribunes during the Roman republic and the politically motivated prosecutions by Public Attorneys in today's western democracies seems to be a valid one, at least, in order to suggest a remedy considered by the ancient Romans to limit it. The claim, a very limited one, is that there is merit in advocating an

institutional change of the attributes of Public Attorneys in the western democracies in order to remove one source of possible political motivation to the abuse of their powers of criminal prosecution, preventing them from holding any political office, either an elected one or an appointed one, during, say, a period of time of 10 years after leaving the public attorney's office.

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