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Introduction

CONSTITUTION AND REVOLUTION

Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another. Laws must relate to the nature of one nation and the principle of the government that is established or that one wants to establish . . . the laws are related to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established.

—BARON DE MONTESQUIEU, *DE L'ESPRIT DES LOIS*

Criminal laws, necessarily linked to the political system, must never be out of step with the nature of a government. One code will not be appropriate for every nation. . . . However little detail a criminal code may contain, one must endeavor to find the contours of its principles, . . . the spirit of criminal laws, if you will.

—JEAN-PAUL MARAT, *PLAN DE LÉGISLATION CRIMINELLE*

THIS BOOK IS about political founding in the French Revolution. What set the French Revolution apart from all preceding revolutions was not the scale nor the duration of its violence but the ubiquity of its political tribunals and the number of its political trials. Kings had been tried and executed before (though for taking up arms rather than fleeing), but nowhere and never before had the criminal tribunal and criminal law been mobilized to reshape social norms and delimit the legal parameters of Republican citizenship. Why and how was this the case?

J.G.A. Pocock's *Machiavellian Moment* posed the problem of republican foundation as “the moment in which the Republic confronts its own instability in time,” as “that moment when a new republic first confronts the problem of maintaining the stability of its ideals and institutions.”¹ My argument in this

book is that the struggle for political stability in the first French Republican moment played out as much through a criminal tribunal as through a legislative tribune—through exceptional as opposed to constitutional jurisprudence.

Revolution and law make odd bedfellows, it is true. But here I differ from many others—Edmund Burke and Hannah Arendt, for example—who argue that law and revolution are inherently incompatible concepts.² For Arendt, revolution is defined precisely by its lawlessness, in political terms as a “state of exception” that is, by definition, *hors la loi*.³ The claims of this book, however, are historical rather than normative. In fact, the French Revolution was a veritable engine for the manufacture of law. During the revolutionary decade 1789–1799 alone, the successive French national assemblies and their delegates issued somewhere on the order of 20,710 laws, ordinances, and decrees. Of these laws, 13,118 (more than 60 percent) were promulgated during the two-year period of emergency and then “revolutionary government” (broadly defined as August 1792–September 1795).⁴ But between 1792 and 1795, France had no constitution. A constitution proved impossible to put into place in the midst of civil and international war, so instead the revolutionaries created a new conceptual category: “revolutionary law,” and the institutions and practices (governmental and juridical) they deemed necessary to its application and enforcement. At its heart lay the Penal Code of 1791, as well as the rich legacy of criminal jurisprudence, criminal courts, and police procedures that the revolutionaries inherited from the Old Regime. Under most circumstances, penal and constitutional law can be conceptually understood as two sides of a single coin. The constitution defines sovereignty; penal law protects it. It is the law that ensures the rights, institutions, and principles guaranteed in the constitution. In this sense penal law is the negative reflection of the constitution. As Pierre Lascoumes, Pierrette Poncela, and Pierre Lenoël observe regarding the French Penal Code of 1791, “There is therefore a whole series of direct links between the provisions of the *Declaration of the Rights of Man and of the Citizen* and certain criminal offences. The code is first and foremost part of the logic of political and public law.”⁵ Penal law does not merely repress transgressions of the public order defined in the constitution; it is expressive of the norms inherent in the constitution of public order and its limits.⁶

In fact, after abolishing the monarchy on September 21, 1792, the National Convention never formally “declared” or “proclaimed” a Republic. Rather, it declared the “unity and indivisibility of the Republic” on September 25. Dan Edelstein has argued that the revolutionaries had no need to “declare” the Republic because they took republicanism to be inherent in nature and natural law—self-evident, as it were.⁷ One needn’t subscribe fully to Edelstein’s claim that the deputies believed in a form of Republicanism fixed in nature, rather than a form they created through the vast corpus of positive law, to appreciate the important observation that the first Republic was never

formally declared in positive law. The revolutionaries of 1792 thus actively abolished the monarchy but did not, until 1795, positively define a Republic.

Anne Simonin has suggested that the concept of “revolutionary government” was a novel legal fiction deployed by the National Convention: “In 1793,” she writes, “the goal of the Jacobin lawyers was to found a new, Republican, public order in a country in a state of war. To avoid the risk of returning to the previous public order . . . they devised an entirely new state of exception,” and they “invented a new, fictitious, civilian state of siege.”⁸ Civil society itself, rather than the state, required exceptional measures to ensure its survival. This book builds on this fundamental insight, but I am less interested in how revolutionary law accounted for itself (the revolutionary jurisprudence of exception) than in how the law *operated* under these circumstances—in this immanent space, in real courtrooms, with new, transparent, and democratic procedures—and with what consequences. How did the laws that were decreed in this moment of “civilian exception” rework normative ideas of political belonging?⁹

The demise of the constitutional monarchy on August 10, 1792, produced a very particular—and oddly inverted—relationship between penal and constitutional law. The Constitution of 1791 fell by the wayside. It would need to be rewritten. Though a new constitution lay in waiting in 1793–1794, it could not be implemented during the war. To prevent the nation from dissolving into total anarchy, the revolutionary government turned to the prerepublican Penal Code of 1791 and put it into operation with the hope of guiding itself and the nation through the revolutionary crisis in a lawful manner. Herein lay the inversion: constitutions normally precede, or produce, revisions of penal codes, and constitutions define and delimit the parameters of penal law. In 1792–1795 the French National Convention found itself compelled to attempt the reverse—to use penal law to bring a new constitutional regime into being—or, minimally, to create circumstances in which it might be possible to do so. Beyond its repressive functions, criminal law transforms arbitrary violence into the legitimate use of force. In its “revolutionary” incarnation, this process of legitimation at the same time generated and served as a guardian of emerging social and political norms.

Montesquieu’s masterpiece, *The Spirit of the Laws*, is a useful point of entry into the problem of “revolutionary” law. Though it is less noticed than it should be, Montesquieu, more than any other author, was the principal guide of the French revolutionaries at every juncture in their decade-long struggle to create a durable constitution for France. They believed in the guiding principle of his historical anthropology: that “laws must relate to the nature of one nation and the principle of the government that is established” and be “appropriate to the people for whom they are made.” The men of 1789 and their successors were in the business of creating both a new nation and a new people.¹⁰ And, like Montesquieu, they conceived of the law as the matrix from which this new alignment of the people (nomos) and the nation (demos) could emerge.

Montesquieu understood the political implications and risks of his view that every constitutional government has a legal mechanism for states of emergency—the power of executive decree. In France, under the Old Regime, the concept of emergency law formed part of the much broader body of “extraordinary,” as opposed to “ordinary,” law. Ordinary law was meant to apply at all times and in all circumstances. Extraordinary law expressed the king’s prerogative will for a single circumstance alone. But in contrast to the use of emergency powers to protect an existing state, a revolution must bring a state into being and give it legitimation. This is the critical difference between “emergency law” and “revolutionary law,” between a “state of emergency” and a “revolutionary government.” The use of emergency law in a revolutionary setting takes on a novel meaning and has novel consequences. As Robespierre famously put it: “The goal of the constitutional government is to preserve the Republic; the goal of the revolutionary government is to found it.”¹¹ Robespierre’s juxtaposition of revolutionary and constitutional government suggests that he understood “foundational” not simply as a new legal or constitutional order, but rather in the deeper sense of a people/nation that valorizes that order because it believes it is legitimate, that is, created by and accountable to that people/nation.

Unlike Robespierre, however, I take his claim not normatively, but as a description. “Revolutionary law” in a paradoxical sense conjured into being an antifoundational foundation, through emergency decrees rather than a constitution. This law founded and legitimated the first French Republican government. It is more than coincidental that the number and names of the Republics of France (now in its fifth) are still to this day enumerated from neither the Third nor the Fourth Republics, but from the First: 1792–1799. And it is telling that this first Republic—unlike those that followed in 1848, 1877, and 1945—was at its inception constitutionless. French Republicanism, for better or for worse, was born out of revolutionary, rather than constitutional, law. Understanding the emergence of this antifoundational politics of foundation, and its political legacy for France and for modern politics more generally, is the ultimate aim of this study.

Since the Revolution itself, the study of what the French call “public law” during the revolutionary decade—by both legal and political historians—has focused on what we might call the constitutional story: the intellectual and political origins of constitutional design, the strengths and weaknesses of the constitutions of the revolutionary era, and the causes of their successive failures. As Keith Baker has written: “Unlike the American Revolution, which effectively translated the assertion of revolutionary will into the establishment of a stable constitutional order, the French Revolution opened up a progressively widening gap between revolution and constitution that was to swallow up successive efforts to bring the revolutionary movement to its constitutional completion.”¹² It was, in sum, a failed moment of founding.¹³

The central political argument about the French Revolution in recent years has been over the interpretation of this problem: Why did the Constitutions of 1791, 1793, and 1795 fail? Historians of this question, both within and beyond law faculties, can be divided into essentially two schools of thought: those who attribute these failures at constitutional foundation, at bottom, to flaws of internal design (conceptual failure), and those who place a determining emphasis on external contingencies (the inhospitable circumstances and contingencies of their moments of attempted institution).¹⁴ Consensus, to date, lies with the judicious splitters who insist on the compatibility of both forms of explanation.¹⁵

This book poses a different question about revolutionary public law. Rather than seeking to understand why these constitutions failed, I am interested in understanding what forms of law came into being *in place of* a constitutional settlement and with what consequences. The argument of this book is that the singularity of French republican practices of political legitimation—the relative weakness of its constitutional tradition and the relative strength of its revolutionary legalism—is found in the moment of crisis between 1792 and 1795. The regime that emerged in this moment was not extralegal, but it had a very peculiar legal basis—a Penal Code that was deployed and elaborated in the absence of a constitutional referent. A crucial implication of this observation is that it was the criminal tribunal as much as the legislative convention that served as a foundational site of the republican tradition in France, and it was the tribunal that established a set of foundational political practices and a political culture, more broadly, that legitimated it, and continue to do so to this day, in radically different circumstances.¹⁶

The period of exceptional government that is the focus of this book, 1792–1795, is often referred as the “Terror,” and it will likely surprise readers that terror figures hardly at all in the pages of this book.¹⁷ This is not to suggest that there was no terror, especially in the Year II (1793–1794), but the perspective taken here is that terror in the French Revolution was a political rather than a legal phenomenon, even if the law was weaponized to deter political resistance. The word “terror” appears very rarely in the corpus of laws decreed between 1792 and 1795, a fact that is revelatory of the limits of its rhetorical function as a legal concept, even during the period of revolutionary government. Moreover, it is worth acknowledging that insofar as any legal regime has coercive force behind it, there is terror residing within it. In this sense, there is always *terreur par la loi*, even today.¹⁸ The position taken here is that it was not so much the law that was terrible or terrifying as it was the political context in which it operated.

Here is how the Parisian glassworker Jacques-Louis Ménétra captures the political moment of 1793–1794: “At this time terror spread across France and especially across Paris. . . . Everything was in chaos. Neighbors denounced neighbors in cold blood; ties of family were forgotten. One watched oneself; one

dared not to speak; one was always armed.”¹⁹ In his 1824 memoirs, the former Girondist deputy Antoine-Claire Thibaudeau evoked this same moment:

Nothing remained indifferent—the place one sat, a gesture, a look, a murmur, a smile. . . . Under the reign of Terror in France, no one was exempt, it hovered above all heads, it struck without discrimination, arbitrarily and rapidly, and like a near death. . . . Despite the speed of its path it was not progressive; it accrued without anyone realizing, it accelerated because there was no turning back and no one could see a way out. It exceeded all limits; it was atrocious. It immolated both friends and enemies and could be renounced by no one. It was too violent, and it ended, just as it had begun, without premeditation.²⁰

If initially conceived as a weapon of repression, as Hannah Arendt, among others, has suggested, by the winter of 1793–1794 terror became more than an instrument governed by a logic of repression. It morphed into a phenomenon of ungovernable proportions.²¹ It was the stuff of events rather than institutions. The Year II produced a novel political phenomenon that is best described as “total terror”—the fear of all by all. This form of terror was born not from the concentration of power in the hands of a “Triumvirate” in the Committee of Public Safety, but rather from a legitimization crisis that became so deep that no one knew any longer where power resided, whether within the National Convention or even within the Revolutionary Tribunal.

Over the course of the past two centuries, France, of course, has successfully established itself as a constitutional regime.²² But to a degree that is markedly greater than any other modern democratic regime, this constitutional tradition is still rooted in and haunted by its revolutionary past. Since 1793 the French Republic has, to some extent or another—at some moments more and at some moments less explicitly—kept itself alive by keeping itself perpetually “on trial.”



Good laws, as the architects of the revolutionary new regime put it, should “speak for themselves.”²³ And yet, until quite recently, historians of law largely neglected the subject of “revolutionary law.” Amorphously designated within the standard French legal histories as an “intermediary period” between the collapse of the monarchy in 1791 and the promulgation of the Napoleonic Code, the law of the period of revolutionary government, in particular, remained a historiographic backwater. Legal scholars of the nineteenth and twentieth centuries who studied the revolutionary period, with a few notable exceptions, sought to distance the history of their profession from the taint of revolutionary law and the revolutionary tribunals.²⁴ Thus the great historian of French criminal procedure, Adhémar Esmein, wrote in his 1911 treatise on

the history of French law from 1789–1814: “I leave aside the institution and history of the Revolutionary Tribunal. However interesting these subjects may be, they are more appropriately the province of political history and thus have no place in this discussion.”²⁵ Even as recently as the bicentennial in 1989, the stated historiographic aim of the most prominent of these bicentennial publications was to “rescue revolutionary legal history from the shadow of the guillotine,” as the renowned French jurist Robert Badinter put it.²⁶

To be sure, there has been an explosion of interest in many aspects of the legal history of the revolutionary era since 1989, especially in such areas as gender, sexuality, the family, crime, economy, foreign relations, and empire. And yet “Revolutionary law” and the Revolutionary Tribunal largely remained the captive of what one might call the “Thermidorian narrative.” Framed as a history of “political justice,” it has been told as a story of the progressive capture of the key legal institutions, and especially the Revolutionary Tribunal, by the Jacobins and the weaponization of the tribunal against its political enemies. The law, in this telling, can only be understood as an instrument of the factional struggles of the Year II.²⁷

But in the past few decades there has been nothing short of an explosion of scholarly interest, in both France and the Anglophone world, in the legal dimensions of the period of the First Republic that recenters the Revolutionary Tribunal as an instrument of Republican law at the moment of its inception.²⁸ In effect, these historians (and I consider myself among them) have inverted the historical question. Rather than asking how politics shaped the law of the Year II, they are asking how the law shaped its politics and political legacy. As Simonin has written, “the law is not absent but, on the contrary, sovereign under the Terror.”²⁹ It is, if you will, an effort to write a history of the “juridification of politics” rather than the “politicization of justice.”³⁰

The peculiar history of “revolutionary law,” and the story of the unfolding of its “spirit” in modern French political life, require, I think, a somewhat different approach from the writing of legal history, one that must ignore the boundaries of the law itself. This book is at one and the same time a history of legal concepts—a conceptual history of the *idées forces* of revolutionary law—and an ethnographic study of revolutionary trial procedures and their reincarnations in the broader setting of modern French political life.³¹ It would better be described, in the spirit of Montesquieu’s anthropological conception of the law, as a history of *legal culture*, rather than as a legal history or a history of law. Put otherwise, it is a history of the ritualization rather than the institutionalization of law, which allows us to understand how the French revolutionaries produced a normative, as opposed to a constitutional, conception of republican citizenship. And it accomplished this, not only through the rhetorical functions of the law and its ritualization, but through the development of a whole new architecture of criminal jurisprudence that rejected the arbitrary authority of the monarchy and restored judicial sovereignty to the people.

The concept of “emergency law” (*décrets d’urgence*) is at the heart of my study of French revolutionary justice, because it articulates the problem of the relationship of law to moments of crisis. “Revolutionary law,” as I remarked earlier, lends to emergency jurisprudence the transformative aspirations and foundational claims of revolutionary politics. Robert Post has written that the study of constitutional law must encompass three dimensions of legal experience: 1) norms (the relationship of the law to communitarian values); 2) rights (the relationship of the law to the individual citizen); and 3) jurisprudence (the relationship of the law to itself).³² Such an approach is all the more pertinent, in my view, to the problem of interpreting the meaning and consequences of “revolutionary law” because revolutionary law is a concept that attempts to capture what one might call the “middle ground of the law”—that unstable terrain between the particular and the general, the timeless and the immediate, rights and norms. This middle ground—because it exists only in relation to a particular time and place, and at the same time has aspirations to shape human experience beyond its immediate circumstances—can be fully captured only when it is approached anthropologically as a cultural rather than an exclusively juridical phenomenon.³³ Which is to say that law, even exceptional law, insofar as it functions as a mechanism of foundation or legitimation, simultaneously creates both the rules and the subjects that are governed by them.³⁴



The book can be described as a “long history” of the revolutionary republican moment of 1792–1795 with the Paris Revolutionary Tribunal at its epicenter. But it should be clear by now that I have abandoned the idea of a traditional history of the origins and consequences of revolutionary justice and opted instead for a book that is organized around each of the animating principles, or *idées forces*, of revolutionary law. Each chapter explores the genesis of these legal concepts in both theory and practice during the Revolution and their legacies for modern French politics. The chapters focus most intensely on that “republican moment” but also offer an examination of the deep history and long-term consequences of their subject. The chapter ordering, in a loose sense, mirrors the chronology of the revolutionary crisis itself, charting the progressive mobilization of the institutions, concepts, and practices of criminal justice in the service of a new political order whose legitimacy was grounded in this legal proceduralism as it responded to the political crisis that threatened its existence. It thus tackles the problems of revolutionary justice roughly in the order in which they presented themselves to the revolutionaries who had to solve them: How do we deal with traitors? How do we do so lawfully? How can we recognize them? How can their fates be made to serve the higher aim of creating an egalitarian republic? How can the future of democracy be assured?

The first three chapters examine the genesis of key institutions: Chapter 1 begins the book with the problem of political tribunals and their consolidation into the exceptional Revolutionary Tribunal in 1793. What distinguished the French Revolution in the pantheon of eighteenth-century Atlantic revolutions was not, as Arendt would have it, the extent or the intensity of its violence. It was, rather, the ubiquity of political tribunals. Why didn't French revolutionaries simply shoot or lynch traitors, as their counterparts had done in America and elsewhere? The scale of violence was no greater than that of the American Revolution, but why, in the course of eighteen months, did the French deploy more than seventy courts, commissions, and tribunals sitting in over one hundred eighty cities and towns to judge more than thirteen thousand, and perhaps as many as seventeen thousand, traitors?

Chapter 2 turns to the key legislative mechanism of the period of revolutionary government: emergency decree and the ways in which these decrees operated in the absence of a constitution and a constitutional definition of the sovereign source of law. Article 3 of the Declaration of the Rights of Man and of the Citizen of 1789 established that "sovereignty resided in the nation," and this definition of the sovereign was incorporated into the Constitution of 1791.³⁵ With the fall of the monarchy on August 10, 1792, the Constitution of 1791 fell by the wayside. The new republican Constitution of 1793 (ratified in August of that year) substituted "the people" for the "nation" as the new sovereign,³⁶ but attempts to implement it were formally suspended until the nation was declared to be out of danger. Revolutionaries thus faced the unprecedented problem of how to establish and defend some sort of legal parameters of "the sovereign people" in the absence of a positive legislative definition of its identity.³⁷ These laws against treason and conspiracy proliferated, seemingly without end, into a semiotic *mise en abîme* in the absence of a secure, legitimately accepted metonymical representation or embodiment of the whole.

Chapter 3 traces the legislative debates over the separation of judicial and executive power in the early years of the revolution and the devolution of judicial authority from the crown to "the people." Where would the agency to initiate a judicial proceeding reside? The creation and empowerment of the elected Office of the Public Prosecutor (*accusateur public*) was a radical experiment in democratic self-governance. The public prosecutor emerged from the ashes of the former royal magistracy as the democratic incarnation of judicial agency. Thus, when the National Convention devolved its exclusive power to indict those accused of political crimes to the public prosecutor of the Revolutionary Tribunal in April 1793, judicial sovereignty shifted with it.

The next six chapters then turn to how key concepts of revolutionary jurisprudence and their method of operation—suspicion, indictment, evidence, self-defense, judgment, and the trials themselves—were deployed to adjudicate the shifting border between traitors and patriots, and their role in constructing Republican identity and legitimacy. Chapter 4 engages the infamous

“Law of Suspects” decreed on September 17, 1793, which led to the preemptive detention of tens of thousands of men and women. They had committed no criminal act but were nonetheless deemed, because of their speech, writings, comportment, or associations, to be a potential threat to the nation.³⁸ Revolutionary surveillance progressively abandoned the old regime strategy of monitoring suspicious types or classes (e.g., priests and nobles) and instead began to identify behaviors (emigration) and their social effects (speech, comportment, sociability, sumptuary norms, etc.). The multiple legal iterations of suspicion—local, regional, and national—over the course of 1789–1793 formed a kind of national conversation, albeit a brutal one, about the nature of republican society and civic identity.

Chapter 5 focuses on civic denunciation and legal indictment (*actes d'accusation*). By the Year II (1793–1794), denunciation of counterrevolutionary activity not only was encouraged, it was a civic duty, and dereliction of that duty became an act of treason in and of itself. By 1793–1794 denunciations to local committees of surveillance percolated upward into a vast network of investigative entities. These preliminary investigations arrived ultimately at the Office of the Public Prosecutor whose task it was to transform them into a formal *acte d'accusation*. The line between denunciation and accusation, between civic policing and public prosecution, thus began to blur. And, in turn, formal judicial indictments, whether written by deputies or by prosecutors, were put to political as well as judicial ends through their printing and publication as broadsides. Through the *acte d'Accusation*, the public prosecutor put his case not only to the jury in the courtroom but to the tribunal of the people. “Indictment” became one of the most ubiquitous political tropes in the civic arena of the first Republic and beyond.

The next three chapters—“Seized Letters,” “Professions of Innocence,” and “Inner Convictions”—examine the special problems of evidence, intention, self-defense, and juror judgment in cases of political treason. The Revolutionary Tribunal in Paris has the reputation of a killing machine. But the juries of the Revolutionary Tribunal itself were less eager to convict than is often assumed: The acquittal rate of the tribunal between March and September 1793 was about the same as that of the regular criminal tribunals. Even after Prairial, with purged juries and no right to self-defense, nearly 20 percent of defendants were spared their lives. How was it possible to be found innocent?

Chapter 6 takes up the problem of the evidentiary forensics of treason. What form of evidence could persuade not only a jury but also the public at large? Treason is the most difficult of all crimes to prosecute because it is, by definition, an incomplete crime. And it was particularly difficult to adjudicate in the space of political immanence that was France in 1793–1794, when the border between traitor and sovereign was unstable. Moreover, it is often as much a crime of intention as of acts: Was letting the gunpowder go damp neglect or sabotage? As the political crisis became deeper, prosecutors became

increasingly skeptical of relying on denunciations and testimony from citizens who were often motivated by personal, rather than patriotic, considerations. In the Revolutionary Tribunal, where in theory a convincing witness could alone persuade a jury to put a defendant to death, prosecutors turned increasingly to what they perceived to be less impressionistic and less manipulable forms of evidence—material objects and the written word.³⁹

What emerged as the most powerful form of evidence in cases of counterrevolutionary crimes was the “seized” letter, which betrayed the most intimate and unguarded political sympathies of both its sender and its intended recipient. Drawing on a literary trope that lay at the heart of late eighteenth-century sentimentalism, the “private letter unwittingly made public” offered the Revolutionary Tribunal undistorted and irrefutable evidence of what lay in the innermost recesses of the citizen’s heart. It was the word made flesh. A seized letter thus lay at the heart of the three most important legitimization crises of the Revolution: the fall of the king, the expulsion of the Girondins, and the execution of Danton. And these letters still do their work of legitimization through public display.

Chapter 7 considers the question of the defense of the accused. In the absence of defined parameters of the sovereignty against which an act could be deemed treasonous, treason came down to questions of political credibility. As the head of the jury that acquitted Jean-Paul Marat put it, “I cannot impute criminal and counterrevolutionary intentions to the intrepid defender of the rights of the people. It is difficult to contain one’s just indignation when one sees one’s country betrayed on all sides.”⁴⁰ The determination of political innocence or culpability in courtroom proceedings thus unfolded as a dramatization of moral character. For the accused, life and death hinged on this public act of political self-reckoning. Public professions of innocence were eventually, in principle, compelled from political detainees by the law of 8 Ventôse as an obligatory element of trial procedure through the decree that “Any person wishing to claim their liberty must make a full account of their activities and actions since the 1st of May, 1789.”⁴¹ Unlike the confessions made under torture and invariably admitting guilt, such as those made by the prisoners in the Soviet Terror, professions of innocence were performance of credibility and sincerity. Shortly thereafter, the Convention entertained a further decree requiring all *deputies* themselves to write and pay to have printed and published a political self-accounting as a testament to their unwavering republican virtue. In this moment of extremis, revolutionary legislators, the children of Rousseau, the *Juge de Jean-Jacques*, thus sowed the seeds of modern political autobiography as an exercise in self-legitimation.

Chapter 8 turns to the problem of jury judgment. The juries of the Revolutionary Tribunal, as politically inoculated as they were, spared more than 50 percent of those accused of this capital crime, far lower than any other European eighteenth-century criminal justice system. The new penal system

was designed to sweep judicial discretion into the past. Judges and jurors were meant to “apply,” rather than “interpret,” the law. The jury was meant to make its findings on three questions of “fact” alone: Did the crime occur? Did the accused commit the crime? Did they commit the crime with criminal intent? Revolutionary jurisprudence abandoned the fixed system of legal proof that had guided prerevolutionary judges, in favor of a “free evidentiary standard” that guided jurors to make judgments on the basis of any information that permitted them to arrive at an “inner conviction” of its truth. In the large number of cases where material evidence in the form of objects or written documents was absent, this meant that jurors were left to rely on the credibility of witness and defendant testimony, and circumstantial and demeanor evidence. The judgment of moral character was the essence of the jurors’ work. In the end, the “Third Question” was probably the most crucial variable in explaining high rates of acquittals, especially with respect to political crimes.

Finally, the closing chapter presents new quantitative and qualitative data from the archives of the Tribunal that shows that the trials of the “Terror” were not perfunctory or arbitrary and reassesses the social logic of revolutionary justice. Quantitative measurement of the temporality of trials—the time intervals from detention to public trial to judgment—make clear that the perceived acceleration of revolutionary justice was rather a progressive contraction of the public phase of the trial. Prior to arriving in court, defendants before the tribunal had undergone thorough and lengthy preliminary investigations, and many cases were dismissed or deferred for lack of evidence. The public phase of the trial thus evolved from a lengthy adversarial proceeding into a sentencing hearing in a grand jury investigation. Further quantitative analysis of the exact charges brought against defendants, rather than their socio-professional identities, exposes the evolution of the perceived threats to the Republic and the main purposes of their proceedings.

Perhaps the most dramatic transformation of French legal culture during the revolutionary era was the opening of the courtroom to the public, in whose name—rather than a king’s—justice was to be exercised: the People’s justice. From the earliest trials for treason held at the Châtelet in 1789–90 onward, urban radicals were a continuous presence in the courtroom and formed, in effect, a second, self-elected jury that kept the justice system itself on perpetual trial. The opening of the courtroom initially may have been a gesture of appeasement, but over the course of 1791–1794, as the personnel of the tribunal was democratized and its mission radicalized, the public trial served not only as a proceeding aimed at maintaining public order and accountability, but also as an instrument of revolutionary pedagogy. The courtroom, in effect, became a classroom, and revolutionary trials were transformed into a series of lessons aimed at inculcating revolutionary republican *moeurs* through tragic spectacle. Political trials were not only battles to be won in the war against counterrevolution but also wars to win the peace: to transform the French

not only into citizens, but also into democratic citizens of a revolutionary bent. And in this, as a school in revolutionary citizenship, the tribunal was more successful than has been fully appreciated.

Over the course of the Year II, the trials became less spectacular in the theatrical sense, but at the same time the print media of the tribunals, official and unofficial, burgeoned, disseminating acts of indictment, testimonies of innocence, damning evidence, judgments, lists of the condemned and their crimes, and, not least, narratives and images of execution. Both the theatrical courtroom and the print media of revolutionary justice acculturated the first generation of French republicans to a conception of revolutionary citizenship, whose existence depended, most fundamentally, on the policing of civic norms rather than the protection of citizens' rights. Might it once again be worthwhile to revisit the possibility that revolutionary justice was not the exercise of arbitrary violence, but rather a legitimate use of force?



If I am right about the centrality of the criminal tribunal in the story of republican legitimation during the first moment of the French Republic, it suggests a reconsideration not only of the “violence” of the Revolution, but also of the account of both the sources and the logic of French Revolutionary republicanism offered by classical liberal historians descending from Hannah Arendt to Reinhardt Koselleck and François Furet. The political history of republicanism, when viewed through the lens of its juridical practices, reveals a foundational moment in 1792–1794 that was produced less by the “pathogenic” rationalism of Rousseau’s theory of the “general will” than by a revolutionary legalism that was culturally grounded in the tropes and textual practices of romantic sentimentalism. And the aspirations of this revolutionary government were given voice and form through the idioms and institutions of a system of criminal law whose animating principles were derived from utilitarian jurisprudence.

In her remarkable book *On Revolution*, Hannah Arendt described the period of French revolutionary government as a moment when law was subsumed by and became a handmaiden to politics. This study of revolutionary law proposes, rather, that 1792–1795 was the moment in which law *became* the language of French republican politics. It used criminal procedure to produce a polity. This revolutionary legalism, born of the criminal tribunal rather than the legislative convention—out of penal rather than constitutional law—still haunts French republicanism to this day. Ernst Renan famously described the nation as a “daily plebiscite.” This book tells the story of how and why, in France, that plebiscite is shaped by the idioms and practices of a revolutionary tribunal.

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