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### Provostial Justice and the *Hors la loi* Decree of March 19, 1793

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The Revolutionary Tribunal has long attracted the attention of historians seeking to understand the judicial origins of the Terror, but it played a negligible role in the repression of armed rebellion against the Republic.<sup>1</sup> Far more important was the *hors la loi* decree of March 19, 1793 that dispensed with jury trials of rebels and opened the way for thousands of prisoners' summary execution by special commissions operating in rebel areas.<sup>2</sup> Yet historians of the Revolution have generally interpreted the law of 22 Prairial (June 10, 1794) as the key legal text that eliminated the right to a fair trial during the Terror.<sup>3</sup> The specialized research of legal historians such as Eric de Mari on the *hors la loi* decree has been largely ignored.<sup>4</sup> However, Dan Edelstein's strikingly original interpretation of the Terror's intellectual origins has brought this decree into prominence as a key embodiment of Jacobin legal philosophy.<sup>5</sup> Building on Mari's work on the decree's circumstantial origins, Jean-Clément Martin has suggested, in contrast to

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<sup>1</sup>Detailed analyses of the formation and operation of the revolutionary tribunal include Emile Compardon, *Le Tribunal révolutionnaire de Paris*, 2 vols. (Paris: Plon, 1866), Henri Wallon, *Histoire du tribunal révolutionnaire de Paris, avec le journal de ses actes*, 6 vols. (Paris: Hachette, 1880-1882), and James Logan Godfrey, *Revolutionary Justice: A Study of the Organization, Personnel, and Procedure of the Paris Tribunal, 1793-1795* (Chapel Hill: University of North Carolina Press, 1951).

<sup>2</sup>On the concentration of death sentences in rebel departments during the Terror, see Donald Greer, *The Incidence of the Terror during the French Revolution: A Statistical Interpretation* (Cambridge, Massachusetts: Harvard University Press, 1935).

<sup>3</sup>See, for example, William Doyle, *The Oxford History of the French Revolution* (New York: Oxford University Press, 1989), who describes the Law of 22 Prairial in detail (p. 275) but overlooks the *hors la loi* decree; Patrice Gueniffey, *La politique de la terreur: Essai sur la violence révolutionnaire, 1789-1794* (Paris: Fayard, 2000), who devotes an entire chapter to the law of 22 prairial (pp. 277-315) but does not mention the *hors la loi* decree; and David Andress, *The Terror: The Merciless War for Freedom in Revolutionary France* (New York: Farrar, Strauss, and Giroux, 2005), who alludes in one sentence to this decree (p. 162) but devotes two pages to the Law of 22 Prairial and its application (pp. 310-311).

<sup>4</sup>Eric de Mari, "La mise hors la loi sous la Révolution française (19 mars 1793--9 thermidor an II)," thèse de doctorat, University of Montpellier, Histoire du Droit, 1991, 3 vols; Paul P. Savey-Casard, "La mise hors la loi à l'époque révolutionnaire," *Revue historique de droit français et étranger*, 3 (1970): 408-429; Michel Pertué, "Note sur la mise hors la loi sous la Révolution française," *Bulletin d'histoire de la Révolution française* (1982-1983): 103-118.

<sup>5</sup>Dan Edelstein, *The Terror of Natural Right: Republicanism, the Cult of Nature, & the French Revolution* (Chicago: University of Chicago Press, 2009), 127-169.

Edelstein, that it marked a return to the state-sanctioned violence of the Old Regime.<sup>6</sup> In this paper, I would like to compare Mari's interpretation of the decree of March 19, 1793 with that of Edelstein and take up Martin's suggestion by asking whether the decree marked a revival of the kind of summary justice practiced by Old Regime provostial courts. To answer this question, I will look briefly at National Convention debates in March 1793 about how to repress counter-revolutionary uprisings in western France and then compare the judicial forms and procedures laid down by the *hors la loi* decree with those of provostial courts. I will conclude that the *hors la loi* decree opened the way for mass executions on a scale never practiced by Old Regime courts because it provided a legal pretext for exterminating anyone associated in any way with armed resistance to the Republic. The consequences of this decree, far more than its origins, were consistent with Montagnard ideology during the Terror.

The most important study of the *hors la loi* decree is an unpublished law thesis by Eric de Mari, *La mise hors la loi sous la Révolution française*, completed in 1991.<sup>7</sup> Mari interprets this decree as a hastily drafted response to pressure from local officials in western France for stern repression of draft riots instigated by counter-revolutionaries. It was a *texte de circonstance* that became the juridical basis for swift and exemplary punishment of armed rebels.<sup>8</sup> As such, the *hors la loi* decree highlights the role of circumstances in the genesis of the Terror. As Mari shows in his exhaustive study of the decree's application between March 1793 and August 1794, its implementation varied widely over time and space, depending on the extent to which judges and military commissioners were influenced by local circumstances, legal traditions inherited from the Old Regime, militant demands for merciless repression, the moderation or extremism of Representatives on Mission, and national policies developed by the Committee of Public Safety in spring 1794 for centralizing the judgment of counter-revolutionaries in Paris.<sup>9</sup>

Mari highlights the radical innovation in French law of declaring suspects *hors la loi*. This legal category did not exist in Old Regime jurisprudence. However, Edelstein has traced the concept to theorists of natural law in early modern Europe, and shown that some Montagnard deputies invoked it during the King's trial to argue that Louis should be put to death without any legal proceedings. As an enemy of humanity, he was consequently *hors la loi*.<sup>10</sup> Indeed, the logic used to justify Louis' execution as an outlaw could be extended to all rebels against the state, in keeping with an idea expressed in Rousseau's *Social Contract* that "Every offender who attacks civil law becomes by his act a traitor and a rebel to his country. By violating its laws, he ceases

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<sup>6</sup>Jean-Clément Martin, *Violence et Révolution: Essai sur la naissance d'un mythe national* (Paris: Seuil, 2006), 150. Donald Sutherland has also traced a precedent for revolutionary justice in the provostial courts of the Old Regime, though he rightly points out that provostial courts judged in a much smaller scale: *The French Revolution and Empire: The Quest for a Civic Order* (Malden, MA: Blackwell Publishing, 2003), 201.

<sup>7</sup>Apart from the law library at Montpellier, the only copy available is at the Institut d'histoire de la Révolution française (University of Paris-I).

<sup>8</sup> Mari, vol. I, 86-98.

<sup>9</sup> Mari contrasts the relatively restrained application of the decree from March through August, 1793 (vol. I, 172-204) with the proliferation of commission and escalation of death sentences from September 1793 through April 1794 (vol. II, 278-348).

<sup>10</sup>Edelstein, 146-158

to be a member, and even wages war against it. The survival of the State is then incompatible with his own, and one of the two must perish.”<sup>11</sup> Edelstein suggests that this passage in Rousseau, which a deputy quoted during the King’s trial, “seems to have bequeathed the Jacobins a violent and volatile theory of justice, in which any criminal offense could potentially deprive the perpetrator of his civilian and natural rights.”<sup>12</sup> Long before hardline Jacobins applied this exclusionary logic to the revolutionary tribunal’s procedure in the Law of 22 Prairial, it influenced the *hors la loi* decree of March 19, which functioned as a state-terrorist “carte blanche” for the “furious repression of counterrevolutionaries.”<sup>13</sup>

Although the *hors la loi* decree was consistent with Jacobin ideology, it also marked a revival of the practice of judging rioters without appeal that had characterized criminal justice under the Old Regime and during the first year of the Revolution. Special tribunals headed by a military judge—the provost or his lieutenant—had been authorized by a 1670 criminal ordinance to exercise jurisdiction over rural rioters and brigands, rendering judgments without appeal. The provosts and their lieutenants were also *maréchaussée* officers, the corps of mounted police that patrolled the countryside. Their provostial lawcourts (*juridictions prévôtales*) were often described as *tribunaux de la maréchaussée*. In cities with Parlements or *présidial* courts, these civilian bodies could also judge rioters without appeal, but in May 1775 at the Flour War’s height, and again in May 1789, faced with a proliferation of grain riots, the king issued royal declarations transferring jurisdiction over rioters throughout the kingdom to the provosts. By the terms of the declaration on May 21, 1789, the leaders or instigators of riots (*émeutes*) and seditious gatherings (*atroupements*) who either had already been or would be arrested in the future had to be sent before the provosts and tried without appeal, along with all their “accomplices, agents, participants, and supporters.” Despite royal authority’s collapse in Paris in July 1789, several dozen rioters in provincial towns and rural areas were sentenced to death and executed by provostial courts in summer and fall 1789.<sup>14</sup>

This royal policy’s purpose was to ensure that punishment of rioters was swift and exemplary. It was predicated on a psychological theory of deterrence. A populace driven by evil passions into rebellion would be shocked into submission by the terrifying spectacle of public executions. If

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<sup>11</sup>Ibid., 156, citing a speech by Pierre Bourbotte in M.J. Mavidal and M.E. Laurent, eds. *Archives parlementaires de 1787 à 1860, première série (1787 à 1799)* 2nd ed., 82 vols (Paris: Dupont, 1879-1913), 54: 398 that quoted Rousseau’s text without attribution. The original passage is in *Du contrat social*, bk. 2, chap. 5, in *Oeuvres complètes*, ed. Bernard Gagnebin and Marcel Raymond (Paris: Gallimard/Pléiade, 1959-95), 3:376.

<sup>12</sup>Edelstein, 157

<sup>13</sup>Edelstein, “War and Terror: The Law of Nations from Grotius to the French Revolution,” *French Historical Studies* 31: 2 (Spring 2008): 257-259.

<sup>14</sup>On provostial justice in the Old Regime, see Iain A. Cameron, *Crime and Repression in the Auvergne and the Guyenne 1720-1790* (New York: Cambridge University Press, 1981), 133-175, A. Esmein, *Histoire de la procédure criminelle en France* (Paris: L. Larose et Forcel, 1882), 40-42, 218-221, and Jacques Lorgnier, *Maréchaussée: Histoire d’une révolution judiciaire et administrative* (Paris: L’Harmattan, 1994), 1: 321-425; 2: 15-370; on provostial justice in 1789, see Ted W. Margadant, “Summary Justice and the Crisis of the Old Regime in 1789,” *Historical Reflections / Réflexions historiques*, 29:3 (Fall 2003): 495-528.

death sentences needed to be reviewed by a higher-level court before they were enforced, the delayed effect of judicial repression would undermine its effectiveness as a means of restoring social order. As for entrusting provosts with the task of punishing rebels, military judges had a more fearsome reputation for severity than civilian judges. As an anonymous defender of provostial justice wrote in 1790, “The intimidated doer sees in a flash the armed soldier arresting him, the judge interrogating him, the prison, the sentence without appeal, the punishment.” Provostial courts combined “the apparatus of justice and that of force, the dreadful uniform of the warrior, and the imposing apparel of the magistrate.”<sup>15</sup> In fact, the public image of the provost was deceptive. All of his activities as an investigating magistrate were identical to those followed by civilian judges in accordance with the 1670 criminal ordinance, which specified the procedures that criminal judges were obliged to follow for recording the testimony of witnesses, interrogations of the accused, reaffirmations by witnesses of their testimony, and confrontations of witnesses with the accused. The provost or his lieutenant was obliged to work closely with a royal prosecutor and a civilian assessor attached to the court, and he was the only military officer on the panel of at least seven judges needed to render definitive sentences that were not subject to appeal.<sup>16</sup>

Honoré Gabriel Riqueti, count of Mirabeau led a campaign against the Provost of Marseille for persecuting patriots there in 1789, and the Constituent Assembly suspended the execution of all provostial judgments in March 1790.<sup>17</sup> Provostial courts, like all “exceptional” tribunals, were formally abolished in September 1790, although jurisdiction over provostial cases was not transferred to new district tribunals until December 1790.<sup>18</sup> There was no prospect of restoring this discredited institution in 1793, but the *hors la loi* decree drew on the precedents of provostial justice: it entrusted military officers with the judgment of rebels captured in arms, it drastically simplified procedures so rebels could be condemned to death quickly, and it mandated the execution of these death sentences within twenty-four hours.

Both the acceleration of procedures and the implicit denial of the right of appeal were directed at perceived weaknesses of the new system of criminal justice designed by the Constituent Assembly and implemented in 1792. This system established a double jury in criminal cases and replaced written depositions and interrogations with oral testimony and debates.<sup>19</sup> Trial by jury made it impossible to punish rioters quickly. No one could be prosecuted unless he or she had been indicted by a grand jury attached to a district tribunal often located in a different town than the departmental criminal tribunal, whose jurors needed to be notified ten days before the court began its monthly sessions. Grain rioters in 1792 were rarely brought to trial in less than two

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<sup>15</sup>Cameron, 257 (quoting *Précis important sur les maréchaussées*, anon. 1790, 15).

<sup>16</sup>For an excellent analysis of provostial procedure and its routine application, see Cameron, 134-175.

<sup>17</sup>On this campaign and Mirabeau’s role in it, see Georges Guibal, *Mirabeau et la Provence*, 2 vols (Paris: A. Fontemoing, 1901), vol. I, 106-171.

<sup>18</sup>Decrees of Sept. 6-11, 1790, cited by Cameron, *Crime and Repression*, 224; and decree of December 24, 1790, cited by Lorgnier, *Maréchaussée*, vol. I, 322.

<sup>19</sup>For an excellent analysis of trial by jury during the revolutionary and Napoleonic periods, see Robert Allen, *Les tribunaux criminels sous la Révolution et l’Empire, 1792-1811* (Rennes: Presses Universitaires de Rennes, 2005).

months.<sup>20</sup> As for delays caused by appeals, the Constituent Assembly had abolished royal pardons and disallowed any substantive appeals of jury verdicts, but it established a *tribunal de cassation* to review appeals on procedural or legal grounds. Unlike procedural appeals to the royal council from the definitive judgments of criminal courts under the Old Regime, which normally did not suspend sentences' execution, anyone convicted by a departmental criminal court could delay the implementation of the sentence for at least a month by appealing to the *tribunal de cassation*.<sup>21</sup> Indeed, this tribunal received so many appeals in criminal cases during its first year of operation that it rarely completed the review in less than three or four months.<sup>22</sup>

Exemplary justice without appeal first revived in Paris on August 17, 1792 with the formation of a special tribunal to judge crimes committed against revolutionary insurgents on August 10. This tribunal became a precedent for the law of March 10, 1793, establishing an extraordinary criminal tribunal to try counter-revolutionaries without appeal. But how could this tribunal's judgments deter counter-revolutionary uprisings in the provinces? When news of draft riots in the Department of Maine-et-Loire reached the Convention on March 12, a deputy from Angers reported that the departmental directory wanted jurisdiction over the rioters transferred from the grand jury at Cholet to the grand jury and criminal tribunal at Angers. Cholet jurors, he argued, could not be trusted to indict anyone because they were the rebels' accomplices or relatives.<sup>23</sup> The Convention passed a decree to this effect, but on March 17, at news that priests and *émigrés* were inciting opposition to military recruitment in the Loire-Inférieure as well as the Maine-et-Loire, the Convention reversed course. At the urging of Montagnard deputy Louis Maribon-Montaut, the legislature revoked the jurisdiction over draft rioters it had given the Angers tribunal and decreed that anyone preventing recruitment would be arrested and sent before Paris' revolutionary tribunal.<sup>24</sup> Yet on the next day, March 18, after the Convention learned of royalists opposing military conscription in Brittany, Jean-Denis Lanjuinais, a Girondin leader from Rennes, proposed a very different strategy for punishing rebels: they should be treated like *émigrés* who took up arms against the Republic. A Girondin-sponsored decree back on October 9, 1792 had stripped such *émigrés* of the right to trial by jury: if captured in arms, *émigrés* were to be sent before a military commission and executed within twenty-four hours.<sup>25</sup> Lanjuinais

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<sup>20</sup>For example, the criminal tribunal of the Seine-et-Oise held twelve trials of grain rioters between April and August, 1792, none of which took place less than two months after the riots themselves. A.D. Seine-et-Oise, 42L 1 and 42L 30.

<sup>21</sup> On the procedure of judicial review, see Jean-Louis Halperin, *Le Tribunal de Cassation et les pouvoirs sous la Révolution (1790-1799)* (Paris: Librairie de droit et de jurisprudence, 1987).

<sup>22</sup>AP 64: 730-767, État des jugements de Cassation rendus depuis le 1<sup>er</sup> avril 1792 jusqu'au 31 mars 1793, delivered to the Convention on May 16, 1793.

<sup>23</sup>AP 60: 135, letter from Garat, speech by Delaunay (D'Angers), and decree, March 12, 1793.

<sup>24</sup>AP 60: 259, session of March 17, 1793, letter from the director of the postal administration; speech by Lefebvre (from Nantes); motion by Maribon-Montaut, amended by Sauvé to retract the decree of March 12 attributing jurisdiction over rioters to the tribunal at Angers.

<sup>25</sup>AP 58: 408-409, motion by Gaudet, one of the most prominent Girondin leaders, and passed without any debate, Oct. 9, 1792. On this decree as a precedent for Robespierre's argument that the King should not be judged as well as for the *hors la loi* decree, see Paul P. Savey-Casard, "La mise hors la loi à l'époque révolutionnaire," *Revue historique de droit français et étranger*, 3 (1970): 409-410. Anne Simonin has argued more generally that revolutionary legislation against



wanted the same law applied to anyone who opposed military recruitment or wore a white cockade. He reasoned that the only way to intimidate the conspirators mobilizing thousands of peasants was to threaten them with summary execution: “To stop them, measures must be prompt, measures that strike immediately and on the spot.”<sup>26</sup>

Several Montagnard deputies objected strenuously to this idea of treating all rebels as armed *émigrés* liable to summary execution. It would include men who were misled as well as true conspirators. Jean-Paul Marat, hero of Parisian *sans-culottes*, denounced Lanjuinais’s “insane” motion for tending to do “nothing less than get true patriots slaughtered.” Marat insisted that only the leaders of a conspiracy should be judged by a military court and sentenced to death. François Lamarque, a Montagnard deputy from the predominantly rural department of the Dordogne, pointed out that a large number of Constituent Assembly deputies had responded to news of rural uprisings in 1790 by demanding severe laws against rebel peasants. On the pretext of denouncing counter-revolutionaries, efforts continued to be made that persecuted patriots who were over-zealous or misled. Warning his colleagues not to confuse “the poor inhabitants of the countryside with the true conspirators, who are the *émigrés* and their correspondents,” Lamarque demanded that Lanjuinais’s proposal be restricted to “the leaders, agents, and instigators of seditious gatherings (*attroupements*).”<sup>27</sup>

Yet after more alarming news arrived from officials in rebel areas of Western France, Bertrand Barère, speaking on behalf of the Committees of Public Security and Defense, reported, “I think that the Convention intends to have the rebels annihilated by force.” “Yes! Yes!” deputies shouted. Barère then beseeched the Convention to approve the principle of establishing “a revolutionary method of judicial prosecution such that the guilty cannot escape and will suffer promptly the punishment due for their crime.” In a decree passed without opposition, the Legislative Committee was charged with presenting a project consistent with this principle the next day, March 19.<sup>28</sup>

Two further debates influenced its deliberations: near the end of the March 18 session, a Montagnard deputy, Pierre Duhem, called on the Convention to give *émigrés* who had returned to France a deadline for leaving the Republic and then declare *hors la loi* those still in France. Although Duhem’s motion was amended to authorize a military tribunal to judge such *émigrés* instead of permitting citizens to “run them down [*courir sus*],” the amended decree set an example for the Legislative Committee’s project.<sup>29</sup> So did a letter from the departmental officials at Angers that was read to the Convention on the morning of March 19. Reporting that military recruitment was only the pretext for a royalist insurrection that had overrun Cholet and two other district towns south of the Loire, these officials called for a *tribunal d’abréviation* to streamline

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the *émigrés*, like the *hors la loi* decree, reintroduced an Old Regime juridical concept of civil death that justified denying any civil rights to traitors against the nation (*Le déshonneur dans la République: une histoire de l’indignité* [Paris: Bernard Grasset, 2008], 316-319).

<sup>26</sup>AP 60: 284-285, speech by Lanjuinais, March 18, 1793.

<sup>27</sup>AP 60: 284-285, March 18, 1793.

<sup>28</sup>AP 60: 296, letter from the minister of War, Beurnonville, March 18, 1793, read in this session; and the decree proposed by Barère and approved, March 18, 1793.

<sup>29</sup>AP 60: 298, March 18, 1793.

judicial procedures against the prisoners they had taken. “We are at war,” they declared, adding “There are few individuals in the *pays de Mauge* [the rebel area south of the Loire] who are not evidently guilty.” In response, the Convention charged its legislative committee to present it promptly (*séance ténante*) with a law “establishing various tribunals to judge militarily and without appeal the authors, instigators, and accomplices of the revolts that have taken place in the departments composing the former provinces of Brittany, Poitou, and Anjou.”<sup>30</sup>

Among the fourteen members of the legislative committee that met on March 19 to draft this law, only four often sided with Montagnards deputies in the factional conflict that had divided the Convention since the King’s trial. Lanjuinais was present, along with two other Girondin sympathizers, but half of these present, including the president of the committee, Jean-Jacques Cambacérès, generally tried to steer a middle course between the rival factions.<sup>31</sup> Pragmatic considerations rather than Jacobin ideology influenced their deliberations. After debating several projects, the committee authorized Cambacérès to draft a decree that declared all those rebelling against military recruitment *hors la loi* and defined this term to mean they could not claim the right to trial by jury. Thus, the term *hors la loi* acquired a juridical meaning of exclusion from regular criminal procedures of indictment, trial, and judgment. But what would replace those procedures? Following the precedent of the decree of October 9, 1792, the committee distinguished between rebels taken in arms, who would be put to death within twenty-four hours if a military commission declared them guilty of this crime, and rebels captured without arms, who would be placed under the jurisdiction of the regular criminal tribunals and judged without a jury. The only safeguard against arbitrary judgments would be the stipulation that judgments of guilt must be based on an arrest report or two witnesses’ consistent testimony. As for whether rebels captured without arms should be executed, here the committee could not make up its mind. One paragraph of its minutes began by stating that those brought before criminal tribunals who were not priests, ex-nobles, former *privilégiés*, or officials before or during the Revolution “will remain under arrest.” However, these words were crossed out and replaced with “will be judged and decimated. Those on whom fate falls will be put to death and the others will be condemned to hard labor.” This astonishing proposal would have imitated the Roman practice of disciplining soldiers by having them draw lots, with one unlucky man in each cohort of ten put to death as an example to his comrades.<sup>32</sup> Yet the next paragraph, presumably added because some committee members found the idea of random executions an appalling perversion of the idea of exemplary justice, stated that the Convention would be asked to decree that “instead of

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<sup>30</sup>AP 60: 317-318, letter of March 17, 1793 from the *conseil général* of the department of the Maine-et-Loire; speech by Delaunay *le jeune*; and decree approved without debate.

<sup>31</sup>AN D III 380: 89, minutes of the meeting of the legislative committee, March 19, 1793, with a list of those present. The Montagnard sympathizers were Lindet, Genissieux, Berlier, and Morisson; the Girondin sympathizers were Lanjuinais, Laplaigne, and Louvet; the others were Cambacères, Garran-Coulon, Roussel, Reguis, Dumont, Genevois, and Baudran. For the political orientations of these deputies, I have followed Alison Patrick, *The Men of the First French Republic: Political Alignments in the National Convention of 1792* (Baltimore: Johns Hopkins Press, 1972), appendix IV, 340-358.

<sup>32</sup>On this Roman practice, see William Smith, *A Dictionary of Greek and Roman Antiquities* (London, 1875), p. 387, unsigned entry referenced on the web at [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA\\*/Decimatio.html](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Decimatio.html)

decimation, the rebels will be kept under arrest until the Convention has ruled in their regard. Nonetheless, all the priests, ex-nobles, *privilégiés*, public functionaries, officers of all ranks, leaders, and instigators will be put to death without delay.”<sup>33</sup>

With or without the decimation clause, this draconian project not only violated the liberal ideals of justice embodied in the Declaration of the Rights of Man and the judicial reforms of 1791, it also stripped the accused of procedural rights designed to prevent miscarriages of justice in the Old Regime. Despite reviving the “two witnesses rule” of Old Regime jurisprudence, no provision was made for the accused to reproach witnesses or challenge their testimony.<sup>34</sup> The accused might lose the new criminal procedure’s benefits without regaining any of the procedural guarantees of justice accorded by the 1670 criminal ordinance.

When Cambacérès presented his draft of the project to the Convention, he conceded that its “severe measures” would be painful to adopt, but argued that urgent “circumstances nearly always command decisions.” Trying to conciliate deputies who wanted to limit repression to rebel leaders, Cambacérès claimed that the project distinguished between the Republic’s enemies and “men more misled than guilty, to whom a salutary hand should be extended.” In fact, he adopted the committee’s proposal in Article 2 that everyone captured in arms would be sent before a military commission and sentenced to death, stipulating in Article 3 only that this fact needed to be proven by two signatures on an arrest report, one signature and the deposition of one witness, or the consistent oral testimony of two witnesses. Dropping any reference to decimation, he proposed two articles about the judgment of those captured without arms or arrested after laying down their weapons. Article 4 began by stating that anyone sent before a criminal tribunal and convicted of participating in the revolt would be handed over to the public executioner and put to death in twenty-four hours. However, a parenthetical clause at the end of the article referred to an exception in Article 6. This article stipulated that priests, ex-nobles, ex-seigneurs, *émigrés*, agents and domestics of these persons, foreigners, those with offices or public functions in the former government or since the Revolution, those who provoked or sustained rebel gatherings, the leaders and instigators, and those convicted of murder, arson, or pillage would be put to death. As for the other prisoners, they were to remain under arrest until the Convention passed a decree concerning them. Thus, while the *hors la loi* decree authorized mass executions by military commissions of rebels captured in arms, it gave jurisdiction over other rebels to the criminal tribunals and restricted sentencing to particular categories of rebels. However, in mandating executions within twenty-four hours of sentencing, the decree made any judicial review of judgments impossible.<sup>35</sup> Having declared rebels outside the law, the

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<sup>33</sup>AN D III 380: 89, minutes of the meeting of March 19, 1793.

<sup>34</sup>On the theory of legal proofs that required corroborative testimony from two irreproachable witnesses for a capital sentence in cases where the accused did not confess, see Esmein, *Criminal Procedure*, 251-271; for a subtle interpretation of the divergence between this theory, which was not mentioned in the criminal ordinance of 1670, and judicial practice in 18th century France, see Bernard Schnapper, “*Testes inhabiles*: les témoins reprochables dans l’ancien droit pénal,” in *Voies nouvelles en histoire du droit: La justice, la famille, la répression pénale (XVIe-XXème siècles)* (Paris: Presses Universitaires de France, 1991), 145-175.

<sup>35</sup>AP 60: 331-332, report by Cambacérès and the draft decree. The final version of the decree added another charge that would result in the death penalty against rebels not captured in arms:



Convention ran the risk that judges, particularly those serving on military commissions, would operate outside the very law that restricted their competency and defined the evidence needed for convictions.

Indeed, this is what happened during the Terror. In part, the willful disregard of the law in the Vendée and other rebel departments of the West resulted from its own inadequacies and the failure of the political strategy it embodied. It proved very difficult for military commissions to convict armed rebels on the basis of the rules of evidence stipulated in Article 3. Few soldiers who captured rebels wrote arrest reports. Many were illiterate and even military officers lacked the experience of police agents or gendarmes who were trained how to record arrests. As for taking testimony, how would military judges identify the soldiers who made the arrests in the absence of a report?<sup>36</sup> Commissions relying on depositions to convict rebels often exceeded their competency because the testimony concerned actions covered by Article 6 of the law that only the judges on criminal tribunals were authorized to prosecute.<sup>37</sup> Whether military commissions or civilian tribunals condemned such rebels to death, it quickly became apparent in the Vendée and other rebel areas south of the Loire that public executions were not intimidating the rebels. If anything, they were creating martyrs and stimulating religious peasants' resolve to fight to the death.<sup>38</sup> The Convention tried to change course in May 1793 by restricting application of the *hors la loi* decree to rebels convicted of leading or instigating others.<sup>39</sup> This was in keeping with

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“those who held ranks in these bands (atroupements).” (AP 60: 347, March 20, 1793). Edelstein overlooks article 2 when he asserts that the decree was directed only at “chiefs” of the insurrection. (“War and Terror,” 259.)

<sup>36</sup> Mari, vol. I, 198-200. For an example of this problem, see the complaints of the president of the military commission established at Les Sables-d'Olonne in April 1793 to try prisoners who were brought to this town without any arrest reports, in a letter to general Boulard published by Charles Louis Chassin, *La Vendée patriote, 1793-1800*, 4 vols. (Paris: P. Dupont, 1893-1895), vol. 1, 137-138.

<sup>37</sup>For example, the military commission at Les Sables-d'Olonne (Vendée) condemned fifty-six prisoners to death between April 15 and May 10, 1793 but only eight of these prisoners were convicted of being captured in arms. The rest were convicted for various offenses specified in article 6 of the law. See Chassin, *La Vendée patriote*, vol. I, 142-152 (excerpts of judgments in a “Résumé des papiers de la Commission” that Chassin found in A.D. Vendée).

<sup>38</sup>For example, a government agent wrote from Les Sables on April 10, 1793 that the prisons were filled with people who patriots in rural communes were trying to get released and that the Commission, lacking evidence that most of them were captured in arms, was faced with the unpalatable alternatives of either pardoning the guilty or condemning the innocent. (Ibid., vol. I, 158, letter from Thomas Baudry to Le Brun, minister of foreign affairs); and three weeks later, a national guardsman at Les Sables-d'Olonne who applauded the execution of seven prisoners at Les Sables d'Olonne on April 23, 1793 wrote: “Ces gueux-là montent la tête haute et fière à l'échafaud.” After several months of civil war, a government agent sent to the Vendée concluded on August 14, 1793 : “Il est impossible de concevoir l'espoir de jamais ramener ces fanatiques; il faut perdre un département” (Louis Mortimer-Ternaux, *Histoire de la Terreur, 1792-1794, d'après des documents authentiques et inédits*, 8 vols. (Paris: M. Lévy frères, 1862-1869), vol. 7, 506, letter from Arnaud to his father.

<sup>39</sup>Decree of May 10, 1793, discussed by De Mari, 124.

a clause of the decree itself, added at Lanjuinais' urging, ordering military commanders to enjoin rebels to disperse and disarm, while promising those who obeyed the injunction within twenty-four hours or handed over the revolts' instigators or leaders at any time would not be prosecuted unless they were among the categories of rebels not exempted from execution in Article 6. However, this attempt to entice rebels to turn on their leaders failed, as did their attempt to restrict executions to leaders of the rebels, very few of whom were captured. By June 1793 veritable armies of counter-revolutionaries, displaying royalist cockades or religious symbols, were threatening major cities in the Loire valley.<sup>40</sup>

When Republican forces regained the initiative in September 1793 and, even more so, when they shattered the Vendéen army's remnants at the battle of Savenay in December 1793, so-called military commissions, appointed by Representatives on Mission and often consisting of political militants instead of military field officers, embarked on a new strategy of extermination.<sup>41</sup> Nearly ten thousand prisoners were sentenced to death and executed by these commissions, whose representatives on mission authorized to try on any charge related to public security.<sup>42</sup> Only one feature of the *hors la loi* decree remained: rebels could be judged and sentenced to death without a jury trial. Similar commissions punished Federalist rebels in cities such as Lyon and Bordeaux. The one at Bordeaux was authorized by a special decree on August 6, 1793, but most were established by Representatives on Mission with *carte blanche* to judge anyone accused of counter-revolutionary beliefs or actions.<sup>43</sup> The idea of declaring enemies of the revolution *hors la loi* had already been endorsed by the Convention in a decree passed March 27, 1793 at Danton's urging.<sup>44</sup> Hailed by Montagnard deputies as a weapon against counter-revolutionaries, the policy of stripping citizens of the right to a fair trial by declaring them *hors la loi* evolved into a policy of extermination. Thus, a decree that Mari interprets as a *texte de circonstance* acquired a symbolic meaning that provided the Committee of Public Safety and its Representatives on Mission in the provinces an ideological justification for indiscriminately executing prisoners. Outlaws did not need to be judged according to any rules of evidence. As Carrier—the infamous Montagnard representative on mission at Nantes—declared when he was accused by the Thermidorian Convention of issuing orders to execute prisoners immediately without judgment, “When individuals are outside the law, a judgment is not necessary, they only have to be

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<sup>40</sup>On the Vendéen war in the summer of 1793, see Chassin, *La Vendée patriote*, vol. 2; G. Walter, *La guerre de Vendée* (Paris: Plon, 1953); and Jean-François Chiappe, *La Vendée en Armes, 1793* (Paris: Librairie académique Perrin, 1982).

<sup>41</sup>Edelstein suggests that this strategy derived its legal justification from a decree of August 1 that countermanded the decree of May 10 restricting executions to leaders and instigators of the revolt (Edelstein, *Terror*, 162). However, he is mistaken. The decree proposed by Barère with the goal of exterminating the rebels of the Vendée and passed unanimously on August 1 did not have any clauses about judicial repression. Instead, it authorized the army to wage a scorched-earth military campaign in the Vendée that foreshadowed the infamous infernal columns led by General Turreau in 1794 (AP 70: 108).

<sup>42</sup>On the use of commissions staffed by political militants to execute large numbers of prisoners, see Mari, vol. II, pp. 350-380.

<sup>43</sup>*Ibid.*, vol. I, 117 (on the decree of August 6, 1793); vol. II, 362-365.

<sup>44</sup>*Ibid.*, vol. I, 100.

identified by the tribunal.”<sup>45</sup> In providing terrorists with a legal pretext for mass executions of rebels, the *hors la loi* decree fulfilled the ideological purpose that Edelstein has attributed, I think mistakenly, to its originators.

In conclusion, I would like to emphasize a key difference between the practice of exemplary Old Regime justice and revolutionary justice in provincial France during the Terror. The judges on provostial law courts had discretionary sentencing authority, but this became incompatible with the liberal ideal of equal justice for all as embodied in the penal code of 1791. However much local officials in the Vendée clamored for a return to exemplary justice in March 1793, the *hors la loi* decree specified only one penalty for armed rebellion and that penalty was death. In 1789, the prosecutors on provostial courts usually recommended harsh sentences against only a small number of rioters, and in only one case, following the murder of the mayor of Troyes, did the judges sentence as many as five rioters to death. Most prisoners were either released without trial, acquitted, or sentenced to lesser penalties such as imprisonment or hard labor. By contrast, even in their early months of operation, when military commissions and criminal tribunals in the Vendée did evaluate the testimony of witnesses, they sentenced dozens of rebels to death, who were often executed in batches over successive days.<sup>46</sup> By early 1794, military commissions operating at Angers and Nantes were sending over a hundred prisoners a day before firing squads.<sup>47</sup> Having eliminated the juries that liberal National Assembly deputies established as a guarantee of a fair trial, and having stipulated the death penalty for all rebels captured in arms, the *hors la loi* decree became the vehicle for a form of revolutionary justice that became indistinguishable in rebel areas of the West from state-sanctioned mass killings.

Ted W. Margadant

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<sup>45</sup>Speech of Carrier to the Convention on 2 frimaire an III, cited by Savey-Casard, “La mise hors la loi,” 419.

<sup>46</sup>For detailed evidence about the deliberations and judgments of the military commission operating at Les Sables d’Olonne, in the department of the Vendée, that pronounced 55 death sentences between April 15 and May 3, see Chassin, vol. 1, pp. 132-153. For a more favorable analysis of a military commission and a revolutionary section of the criminal tribunal at Nantes that together rendered 191 death sentences and 287 acquittals between March 1793 and February 1794, see Bruno Hervé, “La répression des insurrections rurale en Loire-Inférieure: violence terroristes ou transactions judiciaires (novembre 1793-février 1794),” in *Les Politiques de la Terreur, 1793-1794*, edited by Michel Biard (Rennes: Presses Universitaires de Rennes, 2008), 155-170.

<sup>47</sup>Jean Petit, *La justice révolutionnaire en Maine-et-Loire sous la Convention (21 septembre 1792-27 juillet 1794)*. Thèse pour le doctorat en droit, Faculté de droit, Université de Poitiers, [1966], mimeographed, BN: 4o Lk4 4519; and Alfred Lallié, *Les fusillades de Nantes, 1793-1794* (Nantes: Forrest et Grimaud, 1882). The military “Commission Bignon” established at Le Mans on December 14, 1793, and operating also at Laval and Nantes, sentenced to death 2,620 of the 2,638 individuals whom it judged. Hervé, “La répression des insurrections rurales en Loire-Inférieure,” 164, note 29.

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