REVOLUTIONARY JUSTICE IN PARIS, 1789–1790

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Introduction

As the deputies to the Estates-General gathered in Versailles in the spring of 1789, their mandate to help institute a systematic reform of the criminal justice system could hardly have been clearer. Speaking of the reforms "we have been thirsting after for so long," one confident pamphleteer asserted that "the representatives of the Nation will assist in the completion of an absolutely necessary task. This desire is in every heart and is echoed by every mouth." Or, as one nineteenth-century student of the *cahiers* of 1789 explained, "it was the entire nation which demanded reform." Moreover, if we are to believe a Parisian magistrate who was destined to play a prominent role in administering revolutionary justice during 1789–90, public opinion had been solidly behind such demands for some time. Writing in 1781, Châtelet judge André-Jean Boucher d'Argis declared that "criminal law reform is being called for by everyone, by Magistrates as well as by Citizens." And even the recalcitrant Parlement de Paris had to acknowledge in 1786 that a "general cry" had been raised against the existing procedures, now seen as nothing but "a remnant of ancient barbarism."[1]

But what was the nature of this "reform" that everyone wanted, or at least everyone whose views somehow registered in what passed for pre-revolutionary public opinion? What kinds of attitudes towards crime and punishment were reflected in the calls for an end to a system which "makes the innocent groan and aggravates the torments of the guilty," and how might these attitudes have influenced the course of early revolutionary justice?[2] In particular, can we innocently accept Condorcet's assertion that "the desire for a more lenient criminal justice system" was part of the pre-revolutionary "common faith," and then attempt to trace the impact of this desire on the treatment of political opposition during the early Revolution?

Or is it first necessary, as would insist the legal revisionists discussed in the Preface, to "unpack" the meaning of the term "lenient"?

In the most comprehensive study to date of the thought of late eighteenth-century French judicial reformers, Joanne Kaufmann reaffirms the well-established notion that a clear consensus had developed concerning the kinds of changes seen as necessary in the criminal justice system. However, unlike earlier historians who also emphasize the homogeneous and repetitive nature of pre-revolutionary judicial reform literature, Kaufmann does not, as already noted, see the reformers as being primarily interested in establishing a more lenient, more humane, or more benevolent judicial system, at least not in the sense ordinarily attributed to these words. Instead, their main goal, in her view, was to build a more secure foundation for an orderly society through the institution of more effective and more efficient punitive measures. Or, to use Foucault's words, the aim was "not to punish less, but to punish better."[3]

Take, for example, the notion that the degree of punishment inflicted on an offender should be "proportional" to the seriousness of the crime committed. First popularized by the Tuscan reformer Beccaria, a call for some form of proportionality was virtually obligatory in all late eighteenth-century judicial reform texts.[4] But should proportionality be seen as a means of generating milder punishments, of eliminating the savagery and cruelty of the indiscriminate use of the death penalty? Or should it be seen as a means of providing a more satisfactory deterrence by lending more certainty and legitimacy to the punitive process? According to Kaufmann: "Unproportionality led to variation, inequality, and caprice in sentencing, thus robbing the law of its punitive threat as criminals would usually count on leniency." Thus, the journalist and littérateur Delacroix argued against the death penalty for domestic theft because it created a reluctance to prosecute: "In advocating public works as the appropriate penalty Delacroix hopes that such 'leniency' would produce greater severity in law enforcement." In the same vein, the reformers used what might be described as an early form of Orwellian "double-speak" to think of themselves as "humane": "Humane justice would be proportional, more rational – as much in terms of 'ratio' as of reason – but it would be a strict undeviating justice. It was humane, even when severe, because it was comprehensible and predictable, thus providing a certain amount of psychological security."[5]

In a similar way, "Foucauldian" legal historians have also been re-interpreting another of the favorite themes of the pre-revolutionary judicial reformers: the demand for an end to "inquisitorial justice."[6] Hence, Kaufmann argues that statements like "every imaginable precaution must be taken so that life, liberty, and property are never put at risk without good cause" or "the accused has lost all the means accorded him by Natural Right" were fueled not so much by a desire to protect innocent defendants as by the idea that a fair trial would help legitimate the punitive process and "renew confidence in the system of justice."[7] In the same vein, Richard Andrews has recently attempted to unmask the claims of reformers that their attacks on lengthy trial procedures were motivated by humane concern for the rights of imprisoned defendants. For Andrews, these attacks were rooted in an overwhelming desire to see criminals convicted and punished as quickly and as efficiently as possible.[8]

Thus, like the revolutionary revisionist historians discussed above, legal revisionist historians have also been directing their efforts towards exposing the authoritarian or even proto-totalitarian dimensions of late eighteenth-century political and social thought.[9] However, if such efforts have provided a welcome corrective to traditional tendencies to celebrate uncritically the pre-revolutionary movement for judicial reform as a "liberal crusade,"[10] might they not also have raised the spectre of a new form of reductionism? Does a preoccupation with disorder and a desire to establish more effective methods of social control preclude a sense of compassion towards those who are disorderly? Is the urge to regulate behavior totally incompatible with the inclination to be tolerant towards those who resist regulation? Or, recognizing the inevitability of a certain degree of tension between these two modes of feeling, could a genuine desire to "punish better" have coexisted with an equally genuine desire to "punish less"?

In 1781, the future Girondin leader Brissot de Warville, one of the best known of the pre-revolutionary judicial reformers, dramatically depicted the plight of those unjustly accused of crimes:

> Oh you, the accused, whom a rigorous law holds in irons, oh my brothers, I have also felt the fatal indifference which has taken away your liberty and left you suspended. I have been with you as you stretched out on your bed of pain. I have seen your tears flow, and my own tears have followed. I have seen the anger in your heart, and mine has shared your emotions.[11]

Furthermore, Brissot, who will frequently be encountered during the course of this study, voiced similar sentiments regarding the way even the guilty were treated: "How sickened one becomes when one sees the bloody penalties faced everywhere by the guilty, ... when one sees justice arming itself blindly with a dangerous severity against disorders which arise out of the defects of society, ... trying to make up for the shedding of blood by shedding blood and to repair losses by causing losses."[12] And along the same lines, another leading reformer, the Provençal lawyer Bernardi, declared: "How can anyone look on with composure as citizens are so relentlessly pursued for crimes which are either minor or imaginary, locked up in infected and unhealthy cells through a long and rigorous procedure, and forced to spend a great part of their lives in the most cruel uncertainty and amidst tears and despair."[13]

In thereby presenting themselves as "sensitive souls crying hot tears upon their manuscripts,"[14] Brissot and Bernardi were reflecting the currents of sentimentality which suffused much of late eighteenth-century culture and thought. However, if late eighteenth-century sentimentality can be taken as an advanced stage in what Norbert Elias described as the "civilizing process," the widespread presence of "sensitive souls" (or at least of would-be "sensitive souls") during the pre-revolutionary period could have triggered a paradoxical reaction to issues of crime and punishment. According to Elias, a fundamental characteristic of the "civilizing process" is that people "become more sensitive to the impulses of others," while developing a "sharper understanding of what is going on in others."[15] But sensitivity towards those accused of being criminals, including those charged with committing political crimes, can cut in two different ways. On the one hand, the "sensitive soul," as we have just seen in the effusions of Brissot and Bernardi, will feel compassion for others, and such compassion will constitute part of the very definition of being civilized. Or, if it cannot quite bring itself to feel the proper sympathy or empathy, the "sensitive soul" will at least know what it is *supposed* to feel, and it may seek to compensate by trying to tolerate undesirable behavior or opinions. Yet, its greater sensitivity to others will also render the "sensitive soul" more easily offended by what it perceives to be distasteful behavior or opinions, thereby generating greater pressures for more effective enforcement of what are seen as civilized standards.

Thus, we can now differentiate between two equally meaningful

senses in which pre-revolutionary judicial reformers employed the epithet "barbarous" to describe Old Regime criminal justice: it was "barbarous" because it was cruel and inhumane towards offenders, but it was also "barbarous" because it was crude and unrefined in its efforts to deter offenses. Since the "sensitive souls" who developed this twofold critique of traditional justice were obviously far more eager to proclaim their vaunted "humanity" than to highlight their less unequivocally admirable urge to control or "civilize" others, it has apparently been left to the current generation of revisionist legal historians to fully uncover the critique's repressive implications. However, when we observe the early revolutionary authorities wrestling with the problem of how to deal with their political enemies, we will see that the leaders of both the Constituent Assembly and the Fayettist municipal regime in Paris had indeed absorbed the "lessons in humanity" taught by eighteenth-century reformers. While revolutionary turbulence certainly reinforced the authoritarian and rationalistic aspects of eighteenth-century judicial thought, thereby creating a certain amount of pressure for the implementation of vigilant "public safety" measures, this study will emphasize the extent to which pre-revolutionary humanitarianism operated as an effective countervailing force. For the inclination to be lenient towards political offenders ultimately had a decisive impact on judicial policies during the first year of the Revolution.

In tracing the links between pre-revolutionary judicial thought and early revolutionary political justice, one facet of the critique of traditional criminal justice merits particular attention: its treatment of political crime. Though not addressed nearly as often nor with the same degree of quasi-unanimity as ordinary crime, the subject of political crime elicited a stream of thought which, in seeking to narrow the very definition of what was considered criminal behavior, can in itself be seen as encouraging indulgent attitudes towards political opponents.

Expanding upon Montesquieu's celebrated comment that "for a government to degenerate into despotism, it is enough that the crime of *lèse-majesté* [high treason] be vaguely defined," the prolific Brissot declared in 1781 that "high treason is a crime that Monarchs often make use of to get rid of subjects they hate and whose ruin they have sworn."[16] And in another work published in the same year, he stated that "the petty despotism of some ministers has, through an absurd

logic, even understood treason to include conspiracies which have no other goal but that of displacing them, conspiracies which, in the eyes of the impartial observer, are only simple intrigues."[17] As the leader of the Paris Comité des Recherches of 1789–90, the first major French revolutionary institution with the specific responsibility of combatting conspiracies against the new regime, Brissot would have ample opportunity to demonstrate that the commitment to a "decriminalization" of political opposition that is implied in these remarks was more than empty rhetoric. Moreover, his willingness to distinguish between "treason" and "simple intrigue" is especially interesting in light of his later reputation, at least among his revolutionary opponents, as a consummate "intriguer."[18] As someone with a penchant for what today would be called "playing politics," Brissot would never be able to adapt comfortably to the moralistic and doctrinaire aspects of the emerging revolutionary culture.

In addition to advocating restrictions on the definition of treason, the pre-revolutionary Brissot also insisted that if treason trials were necessary, they should follow "the ordinary forms and rules of justice." Furthermore, at least when being published outside France, he endorsed a total abolition of the death penalty, even for regicides.[19] Regarding other political crimes, as a dissident writer with a strong personal interest in free expression, it is hardly surprising to see him suggest that monarchs apply the following formula to subversive literature: "If their authors are motivated by frivolity, we scorn them; if they are insane, we pity them; and if they intend to be harmful, we pardon them." However, his tendency to favor leniency towards political offenders also extended to sedition and popular revolt. Wise governments, he asserted, will focus on eliminating the causes of sedition, and even rebels can usually be pardoned.[20]

While other pre-revolutionary judicial reformers usually devoted less attention to political crime than Brissot, the idea that a loose definition of treason could easily become an instrument of tyranny was, as Giovanna Cavallaro has recently put it, one of the "commonplace" notions of late eighteenth-century judicial thought.[21] Thus, Bernardi proclaimed that "there is scarcely any word which has served to torment wretched humanity more than *lèse-majesté*," and, following Beccaria, he lamented the "art of odious interpretation" to which this word had lent itself. "Only crimes which lead directly to the destruction of society," he stated, "can be considered treason." Similarly, the legal scholar Roussel de la Bérardière explicitly

excluded "court intrigues, fantasies, and other trivialities" from his discussion of treason and declared that "it is indeed very dangerous to use this detestable word without discrimination." And the littérateur and future Paris National Guardsman Chaussard praised the Tuscan Grand Duke Leopold for eliminating from the Criminal Code "this multitude of crimes, improperly called *lèse-majesté*, which were invented in perverted epochs and which have led to unheard-of refinements in cruelty."[22]

Going beyond the specific question of defining treason, it is possible to identify the presence of a vibrant current in late eighteenth-century thought which attempted to extend the general maxims advanced by Montesquieu and Voltaire concerning the need to limit the prosecution and punishment of political and religious behavior.[23] Thus, Valazé, another future Girondin, carefully differentiated between "political vices" and "political crimes," with "contempt for the Constitution of one's country" and "refusal of a post in which one might be useful" being listed as among the vices which presumably should not become subject to judicial pursuit.[24] And Delacroix, voicing an early version of the nineteenth-century notion that political offenders could sometimes be treated more leniently than ordinary criminals,[25] defended the rights of "distinguished writers who could embrace false systems without being criminals and who, without having the intention of disrupting society, only seek to propagate what they think is the truth."[26]

Regarding the impact of such attitudes, it is, as already implied, obviously far easier for dissenting intellectuals to advocate principles of toleration than for those with power and responsibility to embody these principles in actual policies. And certainly the revolutionary behavior of some pre-revolutionary reformers made it clear that they had only been paying lip-service to the defense of political and religious liberties.[27] Yet, the course of events of 1789–90 indicates that, in contrast to those who would succeed them, the early revolutionary authorities operated with a kind of instinctual inclination to pursue policies which would be consistent with the liberal views of political crime enunciated by pre-revolutionary reformers. One might even say they acted as if one of their greatest fears was that some future Montesquieu or Voltaire would add them to some future list of history's greatest tyrants.

However, if early revolutionary leniency towards political opponents can indeed be seen as resulting from a sincere effort to transfer late eighteenth-century judicial thought into the revolutionary arena, it can also be viewed as a logical continuation of eighteenth-century practice. Whereas the turbulent sixteenth and seventeenth centuries were filled with examples of executed and imprisoned ex-ministers, the worst fate that seems to have befallen a disgraced minister in the relatively peaceful and politically stable eighteenth century was that of a polite exile to the offender's own provincial estates.[28] In fact, so far as I can determine, there was only one execution of an important public official during the entire pre-revolutionary eighteenth century.[29] Moreover, to take another genre of political crime, the relatively lenient treatment accorded controversial eighteenth-century writers (i.e. short prison stays for the likes of Voltaire, Diderot, and Brissot) contrasts sharply with the more savage punishment meted out to earlier critics of French society.[30] While evidence on the question of whether ordinary crime was actually being punished less severely in the late eighteenth century remains mixed,[31] there can no doubt that political offenders, particularly those who were either aristocrats or intellectuals, were being treated in what may be thought of as a more civilized manner. In this sense, at least, it can be said that the tolerant and forbearing currents in eighteenth-century social thought were already having a substantial impact on social reality.

Moreover, whatever the actual state of progress towards "enlightened" judicial practices, there seems to have been, as the century approached its end, a widespread perception that "barbarism" was rapidly disappearing. "Humanity is being ushered in by the age," wrote Chaussard in 1788, "the progress of the laws is following the progress of knowledge, and in proportion as a piece of the veil of truth is lifted, the veil of error falls."[32] In the same vein, Brissot spoke of a general "softening of manners" and contrasted the "happy age in which we live" with "these horrible centuries in which France ... saw the blood of its own children flow from everywhere," while his future rival Robespierre celebrated "this enlightened century ... in which the voice of reason and humanity resounds with so much force" and in which people were "becoming more sensitive and more refined because of the progress of our knowledge."[33] Assuring the victims of judicial abuses that changes were imminent, Lacretelle, another soon-to-be member of the Paris Comité des

Recherches of 1789–90, declared: "I dare to promise this to them in the name of the Reason of this century."[34]

Given the pervasiveness of a general sense of pride in the advanced nature of the age, the periodic appearances during the early Revolution of a "ferocity" that was both a reminder of the past and a portent of the future often produced an expression of shock and surprise. "The spirit of Monarchical Courts is still teaching ferocity in such an advanced age," lamented the future Girondin Carra in a report on the Maillebois conspiracy, one of the early counter-revolutionary plots that will be examined in this study.[35] And the right-wing deputy Maury, while attacking attempts by various National Assembly deputies to justify the house arrest of one of their colleagues, shouted: "It is at the end of the eighteenth century that they dare to utter maxims which would scarcely find a place in the instructions given to the executioners charged with carrying out the judgments of Tiberius and Phalaris."[36] While there was certainly an element of exaggeration and political grandstanding in such declamations, the sense of shock that was frequently expressed upon observing the savage judicial rituals carried out by the revolutionary crowd was perhaps more genuine. "Will future generations believe," asked Gouy d'Arcy after one of the popular massacres of July 1789, "that in such an enlightened century, the entrails of a man were torn open and his heart carried on the end of a lance, that his head was passed from hand to hand in triumph through the streets and his cadaver dragged all through the capital?"[37]

In an effort to shed some light on the process through which the humanitarian ideals of the pre-revolutionary judicial reform movement, so influential in 1789–90, came to have less and less influence in determining judicial policies as the Revolution unfolded, this study will place a great deal of emphasis on the role of popular demands and popular pressure. While the impact of "the People" upon the course of revolutionary justice was not always as "barbaric" as that depicted by Gouy d'Arcy, an insistence on judicial severity was, from the very beginning, a central item in the political program of the revolutionary popular movement. With the question of how to treat the enemies of the Revolution serving as a major focal point of early revolutionary political conflict, "the People," or at least those who passed for being its spokesmen, would constitute the most significant force opposing the indulgent inclinations of the

early revolutionary authorities. Throughout 1789 and 1790, both the National Assembly and the Fayettist municipal regime in Paris were, as will be made clear in the chapters to come, largely successful in turning aside popular demands for the prosecution and punishment of anti-revolutionary elements. However, as the Revolution traced its familiar route leftward and the popular movement assumed more and more political weight, the pressure for investigatory rigor and judicial harshness would become more and more difficult to resist.[38]

As already indicated, one of the key aims of this study is to demonstrate that both revisionist revolutionary historians and revisionist legal historians have been underestimating the scope and impact of pre-revolutionary liberal thought. However, the attention that will be paid to popular visions of revolutionary justice will provide a means of achieving something of a reconciliation with revisionist ideas, or at least a means of understanding why the commitment of the pre-revolutionary "enlightened elite" to the humanitarian thrust of Condorcet's "common faith" proved to be so fragile and transitory. With "the People" emerging during the early revolutionary period as the only really viable source of political legitimacy,[39] those members of the "enlightened elite" who could successfully put forward claims to speak for this newly sacred entity automatically assumed a measure of political credibility out of all proportion to their influence within the elite. Of course, in the crucible of the early Revolution, a new conception of "the People" was itself being forged, as the idea of *le peuple* as the popular classes became confounded with and evolved into the notion of *le peuple* as equivalent to *la nation*.[40] But on a day-to-day basis, the most tangible embodiment of both of these conceptions of "the People" was that quintessential French revolutionary protagonist, the Parisian revolutionary crowd. And since whatever else it may have wanted, the crowd was clearly demanding that its enemies be punished, one of the most revealing tests of the credentials of an aspiring popular spokesman quickly became the willingness to discard the liberal and humane assumptions of the pre-revolutionary "common faith."

With pre-revolutionary judicial reformers like Robespierre and Marat presenting themselves as strong advocates of judicial severity from the very beginning of the Revolution, it is evident that, for whatever reasons, at least a portion of the "enlightened elite" was ready to take this step.[41] However, through the first year of the

Revolution, most of the elite, or at least those members of it who exercised political authority, were far from ready to embrace the crowd's perspectives on revolutionary justice. Yet, even as their loyalty to the humanitarian thrust of pre-revolutionary judicial thought led them to oppose the popular urge for punitive rigor and the popular impatience with legal guarantees, other facets of pre-revolutionary judicial thought led these early revolutionary legislators and officials to take positions which were by no means incompatible with certain aspects of what François Furet calls the "ideology of pure democracy."[42]

Thus, for example, one of the most common demands of the judicial reformers had been that all secret proceedings be abolished and that all relevant documents in a criminal action be made available to both the accused and the public itself.[43] At first glance, such a demand might seem to be primarily based on a concern for the rights of the defendant, who would obviously have an enormous interest in acquiring such material and who could, at times, also benefit from the publicity generated by a free press and public trials. But if we consider Brissot's assertion that "Society itself demands this publicity" and his subsequent contention that "the vigilant eye of the public will only frighten those monsters who look for dark places to hide their odious crimes," we realize that the call for judicial publicity was also rooted in a deep concern for social order and "public safety."[44] Or, to put it another way, though the "glare of publicity" may sometimes intimidate repressive governments which seek to limit public knowledge of their repressive acts, it can also serve to impede the secret pursuit of private interest, a pursuit which, from the standpoint of the emerging "ideology of pure democracy," was coming to seem less and less legitimate.[45] Though Brissot and the Paris Comité des Recherches of 1789–90 would actually do more to protect counter-revolutionary conspirators than to turn the "glare of publicity" upon them or to mobilize the "vigilant eye of the public" against them, the establishment of public judicial proceedings in October 1789, which was widely hailed as a triumph of "philosophy," helped contribute to the creation of the feverish atmosphere in which the Comité operated.[46] Furthermore, always sensitive to the importance of maintaining popular confidence, the Comité sought to adapt to this heated atmosphere by cultivating an image of itself as a vigorous prosecutor and investigator, even as it acted quite differently behind the scenes.

On November 11, 1789, for example, Brissot informed his friend Bancal des Issarts that "the Comité des Recherches is taking up all my time, and it is certainly important to uncover old plots and those which are taking shape." "However," he confided, "there do not really seem to be any dangerous ones now." Yet, in sharp contrast to the rather relaxed tone of this letter, his newspaper was insisting at virtually the same moment that "we must spy upon and watch over the traitors who prepare new catastrophes for us in the darkness."[47] While Brissot sometimes argued that this kind of public denunciation of secret evil-doing was actually designed to calm popular fears by convincing "the People" that the Comité was maintaining proper surveillance,[48] it is easy to see how such a statement might also have served to intensify and encourage popular alarms and rumors, an ambiguity in the Comité's activities to which we will repeatedly return in the chapters to come. But whatever impact the Comité may have had in either soothing or exciting revolutionary passions, Brissot would certainly find that the fulfillment of his pre-revolutionary demand for judicial publicity would operate as a constraining factor upon his own actions, making it, as we will see, more difficult for him to give free rein to his indulgent inclinations.

Another aspect of pre-revolutionary judicial thought that was especially compatible with democratic ideology was the demand expressed by many reformers that each citizen be given the right to make official accusations. Bernardi, for example, enthusiastically recalled Rousseau's statement that "in the good times of Rome, citizens maintained careful surveillance over each other and accused each other publicly because of their zeal for justice."[49] While it was sometimes argued that such a procedure would protect defendants against the abuses of secret denunciations, it is not difficult to see how this proposed reform could also become a weapon in the arsenal of "public safety" proponents. And while the pre-revolutionary tendency to advocate "democratic denunciation" was somewhat tempered by a distaste for Old Regime "spies" and "snitches," Comité des Recherches member Agier argued in November 1789 that such "prejudices" were no longer applicable under the "Reign of Liberty":

> Let us stop applying, because of a fatal prejudice, standards which belong only to the Old Regime and not to the present, and let us not dishonor the Reign of Liberty by the stains of slavery. To be silent when it is a question of

denouncing someone is a virtue under despotism, but it is a crime, yes it really is one, under the Empire of Liberty.[50]

In short, though this study will stress the links between pre-revolutionary judicial thought and the generally indulgent and non-vigilant nature of early revolutionary justice, it must also be kept in mind that there were facets of pre-revolutionary thought and early revolutionary practice that reflected the concern with maintaining order and enforcing obedience noted by legal revisionists. Moreover, at least with respect to the threats posed by counter-revolutionaries, it can be said that this concern with control and obedience dovetailed more easily with popular perspectives on revolutionary justice than did humanitarian inclinations inherited from the pre-revolutionary period. Indeed it can perhaps be said that the rationalistic currents of late eighteenth-century judicial thought, which looked to uniform, regular, and public procedures, were, in general, easier to reconcile with the "ideology of pure democracy" than its humanitarian and liberal aspects, which were often seen as leading to special treatment for privileged evil-doers.

Finally, the gingerly manner with which popular demands for judicial severity were treated by the early revolutionary authorities who opposed them can itself be taken as indicative of the deepening impact of democratic ideology on the enlightened elite. In part, of course, the authorities' preoccupation with appeasing or satisfying "the People" represented a response to the newly revealed physical power of the revolutionary crowd. But beyond this, even as they were being thwarted and shunted aside during the period covered in this study, popular demands for judicial severity were accorded a certain measure of respect and legitimacy simply because they were seen as emanating from "the People." And as the Revolution proceeded, it would become harder and harder to resist the judicial implications of popular sovereignty.[51]