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The 18th-Century Body and the Origins of Human Rights

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In the last three decades, historians have begun investigating the changing perceptions of the human body. Much of this work has been influenced by Michel Foucault's contention that the self of western individualism was created by new regimes of disciplining the body. These disciplinary regimes emerged in sites as different as the prison and the experience of sexuality. Foucault cannot be ignored, but to understand the body that possessed rights a different approach is taken here, one that focuses on how individual bodies came to be viewed as separate and inviolable, that is, as autonomous. The separateness and inviolability of bodies can be traced in the histories of bodily practices as different as portraiture and legal torture.

In *Discipline and Punish*, Foucault analyzed the disciplinary practices of the prison, but he claimed quite explicitly that schools, hospitals, factories and armies followed essentially the same techniques. All of these sites instituted 'coercive individualization', by which authorities examined, watched, supervised and regulated individuals who were supposed to be internally transformed, corrected and improved in a massive process of 'normalization'. 'The carceral network . . . with its systems of insertion, distribution, surveillance, observation, has been the greatest support, in modern society, of the normalizing power.'[1] In *The History of Sexuality*, Foucault advanced a similar argument about a very different issue; the deployment of new technologies of sex (from confession to psychoanalysis), he contended, produced a new kind of individual, one defined by his capacity for self-surveillance and by his sexual identity. 'It is through sex . . . that each individual has to pass in order to have access to his own intelligibility.'[2]

It followed from this emphasis on individual identity as the product of bodily disciplines that rights could only be understood within the disciplinary regime: 'The "right" to life, to one's body, to health, to happiness, to the satisfaction of needs, and

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beyond all the oppressions or "alienations", the "right" to rediscover what one is and all that one can be, this "right" . . . was the political response to all these new procedures of power.'[3] Although Foucault said in another context that 'This does not mean that we have to get rid of what we call human rights', it is clear that he associates those rights with 'humanism', which, according to him, has been indistinctly 'used by marxists, liberals, Nazis, Catholics'.[4] In other words, for Foucault rights in no way offer protection or resistance to the ever-increasing disciplines of the body or regulation of the population; they are part and parcel of the new disciplinary regime. If individuals did not have rights, then prison – the legal elimination of personal freedom – could not function as a punishment.

The problem with Foucault's account is encapsulated in his list of humanisms: humanism characterizes in equal measure Marxism, Liberalism, Nazism and Catholicism. Foucault's notion of discipline offers no way of distinguishing between modern political regimes; democracy, fascism, communism and police-state authoritarianism all participate in the same regulatory regimes of discipline. Although some version of discipline may be necessary to any form of political order, discipline in itself is not an effective way of distinguishing between political regimes.

Where these regimes do differ is in the weight they give to the notion of individual autonomy and its corollary, the rights-possessing person. Although self-control and surveillance may serve the purposes of order – and are therefore also necessary in some measure for democratic societies – these terms define the minimal requirements (order) not the maximal possibilities (individual participation) of political life. Maximization of political participation requires a notion of autonomy, and autonomy requires, in addition to self-discipline, the separateness, boundedness and a certain sacredness of the body.

The separateness of bodies fascinated Norbert Elias, one of the few scholars before Foucault to take the body seriously as a subject of historical investigation. Elias traced the history of manners in order to show that the notion of a self-contained, separate individual had only gradually developed since the 14th century. What had been lacking in earlier times was 'the invisible wall of affects which seems now to rise between one human body and another, repelling and separating, a wall . . . which manifests itself as embarrassment at the mere sight of many bodily functions of others, and often at their mere mention, or as a feeling of shame when one's own functions are exposed to the gaze of others'.[5] Over time, self-control increased as the threshold of shame lowered. People began to use handkerchiefs rather than blowing their noses into their hands. Spitting, eating out of a common bowl, and sleeping in a bed with a stranger became disgusting or at least unpleasant. Violent outbursts of emotion and aggressive behavior became socially unacceptable. These changes in attitudes toward the body were the surface indications of an underlying transformation in the self. They all signaled the advent of the self-enclosed individual, whose boundaries had to be respected in social interaction.

Although Elias's teleological narrative of progressive self-restraint has been rightly criticized, especially for its caricature of the medieval period, his account does have the virtue of drawing attention to historical variations in the experience of selfhood.[6] Recent studies have traced a growing experience of individual separateness in listening to music, theater-going, domestic architecture and portrait-painting.

These new bodily dispositions in turn facilitated new experiences of interiority or depth of self.

In the decades after 1750, according to James Johnson, opera-goers began to listen in silence to the music rather than walking about to visit and converse with their friends. Their new stance of separateness allowed them to feel strong individual emotions in response to the music. One woman recounted her reaction to Gluck's opera *Alceste*, which premiered in Paris in 1776:

> I listened to this new work with profound attention. . . . From the first measures I was seized by such a strong feeling of awe, and felt within me so intensely that religious impulse . . . that without even knowing it I fell to my knees in my box and stayed in this position, suppliant and with my hands clasped, until the end of the piece.[7]

Theater-goers displayed more of a penchant for rowdiness during performances, but even in the theater changes in seating practices heralded a different future in which plays would be performed in something akin to religious silence. Sitting on the stage was eliminated in French theaters in 1759 and, in 1782, efforts to establish order in the pit or *parterre* culminated in the installation of benches at the Comédie Française. The direction of developments was clear; collective outbursts were to be replaced by individual inner experiences.[8]

Domestic architecture reinforced the trend. The 'chamber' [*chambre*] in French houses increasingly became more specialized in the second half of the 18th century. The once general-purpose room became the 'bedroom': two-thirds of Parisian houses had bedrooms in the second half of the 18th century, whereas only 14 percent had dedicated dining-rooms. The elite of Parisian society began to insist on a variety of rooms for private use ranging from *boudoirs* (from the French *bouder* for pouting – a room for pouting in private) to toilet and bathing cabinets.[9]

The individuation of bodies can also be traced through the rise of portraiture in the 18th century. After mid-century, regular public exhibitions, themselves a new feature of the social landscape, showed increasing numbers of portraits in London and Paris. Even when history painting gained new prominence in France under the Revolution and the Napoleonic Empire, portraits still made up some 40 percent of the paintings shown in the Salons.[10] The prices commanded by portrait painters rose in the last decades of the 18th century, and prints brought portraits to a wide audience beyond the original sitters and their families.

Nowhere were portraits more supreme than in that harbinger of the future, the British North American colonies: four times as many portraits were painted in the colonies between 1750 and 1776 as were painted between 1700 and 1750.[11] To be sure, the explosion of portraits had more than one cause. In particular, commissioning portraits as a mark of status and gentility reflected a more general rise of consumerism. Moreover, likeness – distinct individuality – did not always take pride of place in these commissions. Ordinary people did not wish to look ordinary in their portraits, and some portrait painters gained reputations more for their ability to render laces, silks and satins rather than faces.[12] Still, the very proliferation of individual likenesses encouraged the view that each person was an individual, that is, single, separate, distinctive and original. Critics certainly complained of it; when reviewing the French exposition of 1769 Bachaumont insisted that 'the public [has]

long since complained of the multitude of obscure bourgeois which it must incessantly pass by in review . . . . Thanks to the unhappy taste of the century, the Salon is becoming nothing more than a gallery of portraits.'[13]

The separateness and boundedness of the body established the individual's autonomy from others, and even made possible new kinds of emotional experience. But for those emotions to be mobilized in the interest of human rights, some sense of the body's inviolability was also required. Under the criminal justice regimes of most European countries at the beginning of the 18th century, bodies were far from inviolable; they were instead, as Foucault said, the central focus in 'the horrifying spectacle of public punishment'.[14] Under Old Regime French law, for instance, the death penalty could be imposed in five different ways: drawing and quartering (dismemberment by horses), burning at the stake, breaking on the wheel, hanging, and decapitation. Drawing and quartering and burning at the stake fell into disuse in the 18th century, except for certain notorious cases, but what reformers called cruel forms of punishment persisted.[15] Execution on the wheel, reserved for men, took place in two stages. First, the executioner tied the condemned man to an X-shaped cross and struck each of his limbs and his midsection with two blows of a heavy iron rod. Then the executioner fastened the convict's body, limbs bent backward, to a carriage wheel on top of a 10-foot pole where the already expiring sufferer remained until he died.

Executions were not the only form of corporal punishment; most sentences mandated by the French Criminal Code of 1670, for instance, included some form of bodily violation from among branding, whipping and wearing the iron collar to amputation of the lips, tongue or hand. Focusing on the appellate penal judgments of the Parlement of Paris in 1762, Richard Andrews found: 82 sentences to banishment and branding, usually combined with whipping; 9 to the same combination along with the iron collar; 19 to branding and imprisonment; 20 to confinement in the General Hospital after branding and/or the iron collar; 12 to hanging; 3 to breaking on the wheel; and one to burning at the stake. If all the other courts of Paris were included in the count, the number of public humiliations and mutilations would climb to 500 or 600 with some 18 executions.[16] And all within the space of just one year in Paris.

Violation of the body was not limited to punishment after judgment. When torture was used to extract confessions during the judicial process, the aim was to get the body to tell the truth through pain that the accused was unwilling otherwise to provide. Judicially sanctioned torture to extract confessions had been introduced or reintroduced in most European countries (England being the most notable exception) in the 13th century. In subsequent centuries, many of Europe's finest legal minds devoted themselves to codifying, regularizing and justifying the use of judicial torture. Even in England, where torture did not have a place in the regular judicial process, frequent use of the gibbet and whipping-post and death sentences that included disembowelling and quartering or, for women, burning at the stake (for high or petty treason) put the body's pains at the center of a public spectacle of retribution. Judicial torture did find at least a temporary home in some of the British North American colonies, and whipping, branding, bodily mutilation and even castration (the latter for slaves) were all common.[17]

Sometime around the mid-18th century the tide turned against torture and cruel punishment. In 1754 Prussia's Frederick the Great abolished all uses of judicial torture, and over the next several decades most European rulers followed suit.[18] In 1780 the French government officially eliminated the *question préparatoire*, the use of torture to extract confessions of guilt before sentencing, and in 1788, it provisionally abolished the *question préalable*, torture just prior to execution to produce the names of accomplices. In 1783 the English government discontinued the public procession to Tyburn where executions had become a major popular entertainment and introduced the regular use of 'the drop', a raised stage dropped by the executioner in order to ensure quicker and more humane hangings. In 1787 the Philadelphia physician Benjamin Rush published an influential treatise against the death penalty; many colonies had already begun reducing the number of crimes punishable by death. In 1792 the French revolutionary government introduced the guillotine in order to make the execution of the death penalty as quick and painless as possible. Everywhere opinion seemed to demand an end to the many indignities visited on the bodies of the condemned.[19]

Historians have recently questioned whether Enlightenment humanitarianism had much, if any, influence on this shift. John H. Langbein derided the 'fairy tale' that attributed the abolition of torture to the influence of Enlightenment writings against it, arguing that it collapsed only because its evidence could no longer be trusted by the judges.[20] In a similar vein, Richard Andrews dismissed the 'myths' mobilized by Enlightenment publicists and Revolutionary legislators to denounce the criminal justice system of the French Old Regime. Judicial torture – squeezing legs with wooden braces or forcing water down the throat – was carefully controlled and, according to Andrews, ultimately 'far more destructive of the authority and perspicacity of judges than of the lives and limbs of defendants'.[21] J. S. Cockburn argued that Enlightenment penal thinking actually enhanced the violence of disturbances around the 18th-century English gallows and pillory rather than leading to a decline in brutality.[22]

Yet even these critics have to admit that something did change in attitudes toward the bodies of those charged and condemned. In England, as Cockburn himself admitted, 'there was probably broad agreement that the execution should be as efficient as possible and that the corpse should be spared unnecessary indignities'.[23] The English reformer Samuel Romilly wrote in 1786: 'in proportion as men have reflected and reasoned upon this important subject, the absurd and barbarous notions of justice, which prevailed for ages, have been exploded, and human and rational principles have been adopted in their stead'.[24] Even the defenders of judicial torture now felt it necessary to display their aversion to unnecessary cruelty.[25] By 1789, in short, most Europeans had given up on the judicial use of torture and had come to view with repugnance what now seemed to be excessive brutality in punishments.

Although attacks on judicial torture and cruel punishments had been published before, a veritable flood of criticism rushed into print after 1750. Most of the criticism came from outside the judiciary; French parliamentary judges rarely commented on the use of torture in their courts and, in England, demands for reform came from lawyers and doctors in London.[26] Two events of the 1760s seem to have galvanized

opinion: the Calas case in France (1761–5) and the publication of Cesare Beccaria's *Of Crimes and Punishments* in 1764.[27] At the same time (1762–3), the notion of *droits de l'homme* [rights of man] made its first appearance in the French language, due, it seems, to the rapidly growing influence of Rousseau. In a search of ARTFL, the on-line database of French literature [at *http://humanities.uchicago.edu/ARTFL/ARTFL.htm*], the first use of the phrase turns up in Rousseau's *Social Contract* in 1762.[28] A June 1763 entry in Bachaumont's *Mémoires secrets* reviews a play at the Comédie Française and makes a noteworthy claim about common parlance: 'There is a role in it for a savage which could be very beautiful; he recites in verse everything that we have read scattered about on kings, liberty, *the rights of man*, in *The Inequality of Conditions*, in *Emile*, in *The Social Contract*'.[29] In the 1770s and 1780s, penal reform and human rights language would prove to be mutually reinforcing, not just in France but more broadly in the western world.

On 13 October 1761 Marc-Antoine Calas, son of Jean Calas, was found dead with rope marks around his neck. His father, mother and brother were arrested, along with their servant and a visitor, on the charge of murdering Marc-Antoine to prevent his conversion from Calvinism to Roman Catholicism. The Parliament of Toulouse sentenced the father, Jean, to the *question préalable* and death by breaking on the wheel. First Calas was gradually suspended by his hands, with the cords ever tightening on his wrists and an iron weight pulling on his feet. When he refused to confess after two applications, he was tied to a bench and pitchers of water were forced down his throat while his mouth was held open by two small sticks. Despite two passages of water torture, Jean never confessed or named accomplices.[30] His refusal continued even when he was broken on the wheel. The tortures and execution took place on 10 March 1762. The others escaped death and torture but were not declared innocent.[31]

Voltaire took up the case a few months later and ultimately gained a reversal. The Royal Council first set aside the verdicts on technical grounds and then in 1765 voted for acquittal of everyone involved and the return of the family's confiscated goods. In the course of the affair, many others also weighed in on the case, and as a result, the entire criminal justice system came under scrutiny. Although Voltaire originally interpreted the case as an example of religious bigotry (Jean was condemned because his Catholic neighbors believed that a Calvinist would murder his son rather than let him convert to Catholicism), over the years he came more and more to see it as an example of the defects of the criminal justice system.[32]

The Calas Affair by itself would not have provoked a movement to abolish judicial torture. Like Voltaire, the many lawyers who published briefs about the case did not explicitly oppose the use of judicial torture; their overwhelming concern was with the religious fanaticism that motivated both the common people and the judges in Toulouse.[33] Two other elements were needed to give the case a direct impact on torture: a clear connection to the criminal justice system as a whole and a new sensitivity to the sufferings of the condemned. The Italian Beccaria provided the first; the second was already embedded in the accounts of the Calas case but had to be freed from the casing of the traditional justice system.

Voltaire changed his perspective because of the influence on him of Cesare Beccaria's treatise *On Crimes and Punishments*.[34] Cesare, Marchese Bonesana Beccaria,

came from a Milanese aristocratic family and was trained in the law. An avid reader of the French Enlightenment, the 25-year-old Beccaria wrote his book in a few months and then published it anonymously in 1764 just as the Calas case came under review in France. Jean d'Alembert and other French *philosophes* immediately publicized its significance.[35] Abbé André Morellet, a close friend of d'Alembert, provided a French translation in 1766. In the same year, Voltaire published a commentary on the book under the pseudonym 'by a provincial lawyer'.[36] All this attention attracted the notice of Rome which put Beccaria's book on the Index of forbidden works. Some 28 Italian editions, many with false imprints, and 9 French ones appeared before 1800.[37] An English translation appeared in London in 1767 and was followed by English editions from Dublin, Charleston and Philadelphia. German, Dutch, Polish and Spanish translations followed almost immediately.[38] The flurry of republication made Beccaria's tract the most important work of the 18th century on criminal justice.

From its first appearance, Beccaria's tract seemed to crystallize 18th-century worries about cruel punishment. As the translator wrote in the preface to the first English edition, 'penal laws . . . are still so imperfect, and are attended with so many unnecessary circumstances of cruelty in all nations, that an attempt to reduce them to the standard of reason must be interesting to all of mankind'. In response to those who claimed that English laws were less oppressive, the translator reminded readers of 'the confinement of debtors, the filth and horror of our prisons, the cruelty of jailors, and the extortion of the petty officers of justice', not to mention the 'melancholy reflection' that the number of criminals executed in England was much greater than elsewhere in Europe.[39]

Beccaria's criticism of judicial torture and cruel punishments followed from his fundamental re-evaluation of the principles of criminal justice. He aimed to base penal laws on an entirely new principle (one later made famous by Jeremy Bentham): 'the greatest happiness of the greatest number'. In other words, the laws should not be devised to defend the absolute power of sovereigns, religious orthodoxy or the privileges of the rich and titled. They 'ought to be conventions between men in a state of freedom'. The most important conclusion to draw from his arguments, Beccaria insisted, was that punishment 'should be public, immediate and necessary; the least possible in the case given; proportioned to the crime, and determined by the laws'.[40] Two topics consequently occupied him above all others: torture and the death penalty. Both failed his test of reasonable punishment.

Beccaria condemned judicial torture on several grounds: it took place in private; it was a form of punishment before conviction of guilt; and as a test of truth it failed and often led to conviction of the innocent. Since he believed that deterrence was the only possible rationale for punishment, he also opposed the death penalty; he advocated perpetual slavery [forced labor] as a substitute because 'there are many who look upon death with intrepidity and firmness'. Most significant, however, was the argument that the death penalty was 'pernicious to society, from the example of barbarity it affords'. Such barbarism was only exacerbated, Beccaria maintained, by the 'formal pageantry' that accompanied it. He also objected to 'torments and useless cruelty' in punishment, calling them 'the instrument of furious fanaticism'.[41]

Beccaria's prose spoke in cool and almost calculating tones; he gave no specific

examples, and he discussed no particular country. [Judicial torture took different forms in different countries and even in different jurisdictions within countries.[42]] Narratives of individual suffering did not animate his argument, which relied on rational deduction from general principles. Yet behind every precept stood an implied history of 'secret tyranny' as well as 'public and solemn cruelty'.[43] The French translator changed the order of Beccaria's presentation in order to highlight these implications and to underline the connection to human rights. The following paragraph provides the most telling example:

> If I have no other merit than that of having first presented to my country, with a greater degree of evidence, what other nations have written, and are beginning to practise; I shall account myself fortunate; but if, by supporting the rights of mankind [i diritti degli uomini] and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or of ignorance, equally fatal; his blessing and tears of transport, will be a sufficient consolation to me for the contempt of all mankind.[44]

This paragraph is more or less buried at the end of chapter 11 in the original Italian edition of 1764, but Morellet made it part of the final paragraph of the introduction to the entire book. Rights now clearly appeared as the bulwark against individual suffering.

Beccaria provided a new framework for the sentimental narratives about the victims of injustice. The lawyers' *mémoires* written on behalf of the Calas family, like Voltaire's pamphlets on the case, had lingered on the moment of Jean Calas's torture and death, but without challenging their legitimacy as penal instruments.[45] The pro-Calas lawyers shared the assumption that the body in pain would tell the truth; Calas proved his innocence when he maintained it even in pain and suffering. Loyseau de Mauléon, for example, insisted that 'Calas withstood the question [torture] with that heroic resignation that belongs only to innocence'. Loyseau argued, moreover, that the 'majestic perseverance' of old Calas marked the turning point in the sentiments of the populace. Seeing him repeatedly affirm his innocence during torture and then whilst breaking on the wheel, the people of Toulouse began to feel 'compassion' and to repent of their earlier unreasoning suspicion of the Calvinist. Each blow of the iron rod 'sounded in the bottom of the souls' of those witnessing the execution, and 'torrents of tears were unleashed, too late, from all the eyes present'.[46] It was only when Beccaria's global criticisms were added to these sentimental narratives of pain that torture itself became unacceptable.

Eighteenth-century people came gradually to see the pain of judicial torture as unnecessary suffering. As Voltaire affirmed in his commentary on Beccaria, 'a natural compassion in the human heart' makes everyone detest the 'cruelty' of judicial torture.[47] Reformers explicitly denied the religious resonance of the pain of torture; such pain could not be justified as leading to redemption through confession. In his chapter on torture, Beccaria denounced 'another ridiculous motive for torture, namely, *to purge a man from infamy*'. This 'absurdity' could only be explained as 'the offspring of religion'. Since torture rendered the victim infamous in the first place, it could not take the infamy away.[48] Judicial torture in this view constituted an assault on society itself; it brutalized the individual rather than opening the door to salvation through repentance. Pain came to have an entirely secular and medical mean-

ing. It might be justified as part of punishment (there was division of opinion on this issue); it could not be justified as a means for getting at the truth in the judicial process.

Under the old regime of punishment, the condemned person had functioned as a sacrificial victim whose suffering would restore wholeness to the community and order to the state. The sacrificial nature of the rite was underlined by the inclusion in many sentences of a formal act of penitence; in the French *amende honorable*, for example, the condemned person carried a burning torch and stopped in front of a church to demand forgiveness on the way to the scaffold.[49] Under the new regime outlined by Beccaria and other reformers, such suffering now signaled a tyrannical and ignorant attack on the dignity of the individual body which could not be sacrificed to the needs of the community. As the English reformer Henry Dagge insisted, 'the good of society is best promoted by a regard for individuals'.[50] The good functioning of the community and the state now required respect for the individual body. The English lawyer William Eden therefore denounced the exposure of corpses:

> we leave each other to rot like scare-crows in the hedges; and our gibbets are crowded with human carcases. May it not be doubted, whether a forced familiarity with such objects can have any other effect, than to blunt the sentiments, and destroy the benevolent prejudices of the people?[51]

Defenders of judicial torture and traditional punishments immediately saw the danger in Beccaria's approach. Pierre-François Muyart de Vouglans, who published in 1780 the final defense of the Old Regime French criminal justice system [*Les Lois criminelles de la France, dans leur ordre naturel*], also published a refutation of Beccaria in 1767. Muyart found it necessary to begin by debunking the argument from sentiment: 'I pride myself on having as much sensibility as anyone else; but no doubt I do not have an organization of fibers [nerve endings] as loose as that of our modern criminalists, for I did not feel that gentle shuddering of which they speak'.[52] Muyart instead felt surprise, not to say shock, at seeing that Beccaria built his system on the ruins of all received wisdom. He objected in particular to Beccaria's rationalist approach; 'sitting in his study, [the author] undertakes to trace the laws of all the nations and make us see that until now we have never had an exact or solid thought on this crucial subject'.[53]

The reason it was so difficult to reform criminal law, according to Muyart, was that it was based on positive law and depended less on reasoning than on experience and practice.

Muyart took great pains to defend the use of judicial torture against Beccaria's denunciation. Against the example of one innocent falsely convicted, he cited the 'million others' who were guilty but could never have been convicted without the use of torture. Not only was judicial torture therefore useful, it could also be justified by the ancientness and universality of its use. Needless to say, Muyart also objected to Beccaria's argument against the death penalty; Beccaria's 'system' contradicted canon law, civil law, international law and the 'experience of all the centuries'.[54]

In his concluding passages, Muyart went straight to the heart of the dispute over

the significance of pain and suffering. He objected in the strongest terms to Beccaria's attempt to found his system on 'the ineffable sentiments of the heart'. It was revolting, Muyart expostulated, to hear the author refer to 'the sensitivity to pain of the guilty'. 'Precisely because each man identifies [se rapporte à lui-même] with what happened to another and because he has a natural horror of pain, it was necessary to prefer, in the choice of punishments, that which was the cruelest for the body of the guilty' in order to create a deterrence to future crimes. 'Who does not know in fact that because men are shaped by their passions, most often their temper dominates over their sentiments?' Men must be judged as they are, not as they should be.[55]

Some critics of Beccaria saw the hand of conspiracy in the book's fortuitous publication. In 1779 Simon-Nicolas-Henri Linguet recounted what a witness had told him:

> Shortly after the Calas Affair, the Encyclopedists, armed with his torments and profiting from propitious circumstances, though without compromising themselves directly, as is their wont, wrote Reverend Father Barnabite in Milan, their Italian banker and a well-known mathematician. They told him that it was the moment to unleash a declamation against the rigor of punishments and intolerance; that Italian philosophy should furnish the artillery, and they would secretly make use of it in Paris.[56]

Linguet complained that Beccaria's tract was widely viewed as an indirect brief in favor of Calas and other recent sufferers of injustice.

Despite the efforts of Beccaria's detractors, by the 1780s the chorus against torture and cruel punishments had grown to a deafening crescendo.[57] In the 1770s and 1780s learned societies in France, the Italian states, and Swiss cantons offered prizes for the best essay on penal reform. The French government became so worried by the tone of criticism that it ordered the academy of Châlons-sur-Marne to stop printing copies of the essay by its 1780 winner, Jacques-Pierre Brissot de Warville.[58] Brissot followed Beccaria in arguing for the abolition of the death penalty, but it was his vituperative rhetoric that alarmed the government. Brissot invoked 'these sacred rights that man holds from nature', and insisted that 'It is inconceivable that a gentle [douce] nation, living in a temperate climate under a moderate government, could combine an amiable character and peaceful customs with the atrocity of cannibals. For our judiciary punishments breathe only blood and death and tend only to inspire rage and despair in the heart of the accused.'[59] The French government did not like to see itself compared to cannibals.

Brissot's subsequent book, *Théorie des lois criminelles* (1781), originally written for an essay contest in Bern, established him as the new leading light in the movement for penal reform.[60] The term 'humanity' ('the spectacle of suffering humanity,' for example) appeared again and again in his pages. Encouraged despite his youth and lack of experience by other reformers, Brissot then undertook to publish a 10-volume *Bibliothèque philosophique du législateur, du politique, du jurisconsulte* (1782–5), which had to be published in Switzerland and smuggled into France. It brought together Brissot's own and other reform writings. In 1788 Brissot would found the Society of the Friends of Blacks, the first French society for the abolition of slavery. The campaign for penal reform thus became closely associated with the general defense of individual rights.

The reforms suggested in the 1780s went no further than those already proposed by Beccaria, but those who favored penal reform began to insist that practices such as judicial torture were incompatible with civilized society.[61] Brissot likened the French criminal code to Oriental despotism.[62] In 1781, Servan, a long-time advocate of penal reform, applauded Louis XVI's recent abolition of *la question préparatoire*, 'this infamous torture which for so many centuries usurped the temple of justice itself and made it into a school of suffering, where the executioners professed the refinement of pain'. Judicial torture was for him 'a kind of sphinx . . . an absurd monster barely worthy of finding an asylum with savage peoples'.[63] Already in 1775 the English reformer William Eden had drawn the connection between tyranny and cruel punishment: 'When the rights of human nature are not respected, those of the citizen are generally disregarded. Those areas are in history found fatal to liberty, in which cruel punishments predominate. Lenity should be the guardian of moderate governments.'[64] The campaign to abolish torture and moderate punishment thus flowed into the channel created by the emergence of human rights notions and reinforced it. A 'civilized' society defended the human rights of its citizens and therefore forbade torture or cruel punishment.

By 1788, the French crown had signed on to many of the new attitudes; in the decree provisionally abolishing the *question préalable*, Louis XVI's government spoke of 'reassuring innocence . . . removing any excess of severity from punishment . . . [and] punishing evildoers with all the moderation that humanity demands'.[65] The few public upholders of judicial torture struck an increasingly defensive tone. Muyart de Vouglans, in his 1780 treatise about French criminal law, recognized that in defending the validity of confessions won through torture, 'I do not at all ignore the fact that I must combat a system that has more than ever gained credence in recent times'. But he refused to enter into the debate, insisting his opponents were simply polemicists and that he had the force of the past behind his position.[66]

The campaigns for reform of the French criminal law came to a head during the Revolution of 1789. The *cahiers de doléances* [grievance lists prepared for the Estates General of 1789] of the Third Estate ranked correction of abuses in the criminal code as one of the most important issues.[67] This is hardly surprising since the advocates of criminal law reform came from the ranks of the Third Estate (commoners) and often went on to play prominent roles during the Revolution; Brissot, for example, became a leader of the Girondins (sometimes called Brissotins). Decrees of 8–9 October 1789 and 6 October 1791 reformed the criminal code; the sentence of death remained, but only for a few crimes, and it would now be rendered only by decapitation. Public exposure in the iron collar was now deemed applicable only to women and foreigners, not to male citizens. Torture, breaking on the wheel, the *amende honorable* and mutilation and branding were all abolished.[68] Similarly, in the new United States, the Bill of Rights outlawed 'cruel and unusual punishments' (admittedly a notion still open to wide interpretation, especially as regarded slaves).

In a few decades, new attitudes toward judicial torture and cruel punishments had developed deep roots. Long-held notions of sacrificial punishment and truth through pain had withered under the pressure of new experiences of the body that in turn facilitated the emergence of new conceptions of rights of individuals and Enlightenment-inspired critiques of the old ways. What had been commonplace

became barbaric and savage. These changes may have facilitated Foucauldian-style 'normalization', but they had also given a whole new meaning to 'normal.' The notion of a rights-possessing, autonomous, inviolable self became the foundation of democracy as an ideal, even if it was then, and is now, an ideal far from actually achieved.

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Notes

1. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1979: 228, 239, and 304).
2. Michel Foucault, *The History of Sexuality*, vol. 1: *An Introduction* (1980: 155); also vol. 2: *The Use of Pleasure* (1985); and vol. 3: *The Care of the Self* (1988).
3. *History of Sexuality* vol. 1, p. 145.
4. Foucault in an interview quoted by Jana Sawicki, 'Feminism, Foucault, and "Subjects" of Power and Freedom', in Susan J. Heckman, ed. (1996: 173).
5. Norbert Elias, *The Civilizing Process: The Development of Manners* (1978: 69–70).
6. For the critical view, see Barbara H. Rosenwein, 'Worrying about Emotions in History' (2002: 821–45).
7. James H. Johnson, *Listening in Paris* (1995: 61).
8. Jeffrey S. Ravel emphasizes the continuing rambunctiousness of the standing pit in his *The Contested Parterre* (1999).
9. Annik Pardailhé-Galabrun, *The Birth of Intimacy* (1991).
10. George T. M. Shackelford and Mary Tavener Holmes, *A Magic Mirror* (1986: 9).
11. Ellen G. Miles, ed., *The Portrait in Eighteenth Century America* (1993: 10).
12. T. H. Breen, 'The Meaning of "Likeness"', in Miles (1993: 37–60).
13. *Lettres sur les peintures, sculptures et gravures de Mrs. de l'Académie Royale, exposées au Sallon du Louvre, depuis MDCCLXVII jusqu'en MCDDLXXIX* (London: John Adamson, 1780), p. 28 (salon of 1767), p. 51 (salon of 1769). 'The great number of portraits, sir, which I see all around me oblige me to speak of them now, and to deal with that dry and dull material which I had reserved for the end. In vain may the Public complain long and loud of that group of unknown bourgeois paraded before them. The ease of the genre, the usefulness that portraits provide and the vanity of all these little people all go to encourage our budding artists . . . And thanks to the bad taste of this century, the Salon will never be anything more than a portrait gallery.'
14. Foucault, *Discipline and Punish* (1979: 9).
15. Julius R. Ruff, *Crime, Justice and Public Order in Old Regime France* (1984).
16. Richard Mowery Andrews, *Law, Magistracy, and Crime in Old Regime Paris, 1735–1789*, vol. 1: *The System of Criminal Justice* (1994: 385, 387–8 especially).
17. The *Body of Liberties* (1641) of Massachusetts allowed torture to get names of accomplices and shows, moreover, the vagueness of notions of barbarous and inhumane punishments: 'No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capitall case, where he is first fullie convicted by cleare and suffitient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.' Lawrence M. Friedman (1991: 70).
18. Edward Peters, *Torture* (1985).
19. The evidence for England does not always point in the same direction. For example, Parliament dramatically increased the number of capital offenses in the 18th century (by some estimates the

number tripled in the 18th century). Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (1948) vol I: 3–5, 165–227.

20. John H. Langbein, *Torture and the Law of Proof* (1976).
21. Andrews (1994) vol 1: 283, 453.
22. J. S. Cockburn, 'Punishment and Brutalization in the English Enlightenment' (1994: 155–79, esp. 177–8). This seems a false equivalence, however; the government's brutal treatment of condemned bodies cannot be equated to the crowd violence at the scene of punishment.
23. *Ibid*., p. 163.
24. As quoted on page 668 of Randall McGowen, 'The Body and Punishment in Eighteenth-Century England' (1987: 651–79).
25. Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression* (1984).
26. Lisa Silverman, *Tortured Subjects* (2001). On English reformers, see McGowen (1987).
27. For France see Silverman (2001). The Calas Affair had less impact in England, but Beccaria's treatise inspired much of the reform thinking of William Eden (*Principles of Penal Law*, 1771) and Samuel Romilly as well as Jeremy Bentham (Radzinowicz, 1948, vol. I: 301–81).
28. The origins of the language of human rights is a far from settled matter. On the influence of the Neapolitan school of natural law, see Vincenzo Ferrone, *La Società giusta ed equa* (2003: 100–23 esp.).
29. *Mémoires secrets pour servir à l'histoire de la République des lettres en France, depuis MDCCLXII jusqu'à nos jours* (London, 1780: reprint 1970), vol. 1, p. 230 (entry for June 13, 1763). Since the volumes were published after the dates they purported to cover, we cannot be entirely certain that usage of 'rights of man' was as common as the writer infers by 1763. *The Inequality of Conditions* refers to Rousseau's discourse on the origins of inequality.
30. Berriat-Saint-Prix, *Des Tribunaux et de la procédure du grand criminel* (1764: 93–6).
31. David D. Bien, *The Calas Affair* (1960).
32. Voltaire's framing of the case in terms of religious intolerance can be seen most clearly in *Traité sur la tolérance à l'occasion de la mort de Jean Calas* (1763) in Voltaire, *L'Affaire Calas et autres affaires* (Paris: Gallimard, 1975: 88–194).
33. See, for example, Alexandre-Jérome Loyseau de Mauléon, *Mémoire pour Donat, Pierre et Louis Calas* (Paris: Le Breton, 1762) and Jean-Baptiste-Jacques Elie de Beaumont, *Mémoire pour Dame Anne-Rose Cabibel, veuve Calas, et pour ses enfans sur le renvoi aux Requêtes de l'Hôtel au Souverain, ordonné par arrêt du Conseil du 4 juin 1764* (Paris, Impr. de L. Cellot, 1765). See also Sarah Maza, *Private Lives and Public Affairs* (1993: 19–38).
34. Voltaire reported reading Beccaria in a letter of 16 October 1765. In the same letter he refers to the Calas Affair and to the Sirven case (also involving Protestants). Theodore Besterman et al., eds, *Les Oeuvres complètes de Voltaire*, 135 vols (Geneva; Banbury, Oxfordshire; Toronto: Institut et Musée Voltaire; Voltaire Foundation; University of Toronto Press, 1968–2001: 113) (*Correspondence and Related Documents, April–December 1765*, 29 [1973]): 346.
35. On the reception in France and elsewhere in Europe see the letters reprinted in Franco Venturi, ed., *Cesare Beccaria, Del Delitti e delle pene, con une raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna nell'Europa del Settecento* (Turin: Giulio Einaudi, 1970: 312–24).
36. Voltaire's commentary still emphasized the misuse of cruel punishments in cases against religious dissenters. See *An Essay on Crimes and Punishments, Translated from the Italian, with a Commentary Attributed to Mons. De Voltaire, Translated from the French*, 4th edn (London: F. Newberry, 1775). By 1768, however, torture had come to the top of Voltaire's list of outrages. In a letter he wrote to Beccaria sometime early that year, he described the outrages of the case of the chevalier de la Barre (Venturi, *op. cit.* note 35, p. 438), undated letter but appearing just before one dated May 1768.
37. Luigi Firpo, 'Contributo alla bibliografia del Beccaria. (Le edizioni italiane settecentesche del *Dei delitti e delle pene*)', in *Atti del convegno internazionale su Cesare Beccari promosso dall'Accademia delle Scienze di Torino nel secondo centenario dell'opera 'Dei delitti e delle pene'* [Turin, 4–6 October 1964] (Turin: Accademia Delle Scienze, 1966: 329–453).
38. Marcello Maestro, *Cesare Beccaria and the Origins of Penal Reform* (1973: 43).
39. *An Essay on Crimes and Punishments, Translated from the Italian, with a Commentary Attributed to Mons.*

de Voltaire, Translated from the French, 4th edn (London: F. Newberry, 1775), quotes from pp. iii and vii.

40. *Ibid*., pp. 2 and 179.
41. *Ibid*., pp. 107, 43, and 112.
42. For the French variations, see Berriat-Saint-Prix, *Des Tribunaux et de la procédure du grand criminel* (1764: 74, 103).
43. *Crimes and Punishments*, *op. cit*. note 39, quote p. 41.
44. Franco Venturi, ed., *Cesare Beccaria*, *op. cit*. note 35, pp. 30–1 for the definitive 1766 Italian edition (the last one supervised by Beccaria himself). The paragraph appears in the same location in the original English translation, that is, in chapter 11. But subsequent Italian editions followed the order given in the French translation. See, for example, *Dei delitti e delle pene. Edizione rivista, coretta, e disposta secondo l'ordine della traduzione francese approvato dall'autore* (Londra: Presso la Società dei Filosofi, 1774), p. 4. According to Luigi Firpo, this volume was actually printed by Coltellini in Livorno. Firpo, 'Contributo alla bibliografia del Beccaria', pp. 378–9.
45. Voltaire published a 21–page pamphlet in August 1762 on *Histoire d'Elisabeth Canning et des Calas*. Voltaire uses the same anecdotes and phrases from Calas's torture and death as other commentators. He is outraged not by the use of torture but by the mistaken use of torture. Voltaire, *L'Affaire Calas*, *op. cit*., note 32, p. 81.
46. Loyseau de Mauléon, *Mémoire pour Donat, Pierre et Louis Calas*, pp. 38–9. Elie de Beaumont, *op. cit*. note 33, reports exactly the same words from the mouth of Calas. Voltaire had included them in his pamphlet too.
47. *Commentary Attributed to Mons. de Voltaire*, p. xli. The pages of the commentary are numbered in Roman numerals even though they follow Beccaria's treatise. Voltaire did not immediately argue for the abolition of torture; that came only in his *Prix de la justice et de l'humanité* published in the year of his death, 1778. Venturi, ed., *op. cit*. note 35, *Cesare Beccaria*, pp. 493–5.
48. *Crimes and Punishments*, *op. cit*. note 39, pp. 60–1.
49. Spierenburg, *The Spectacle of Suffering* (1984: 53).
50. As quoted in McGowen, 'The Body and Punishment in Eighteenth-Century England' (1993: 669).
51. As quoted in McGowen (1993: 670).
52. [Pierre-François] Muyart de Vouglans, *Réfutation du Traité des délits et peines, &c*., printed at the end of his *Les Loix criminelles de France, dans leur ordre naturel* (Paris: Benoî Morin, 1780: 811).
53. *Ibid*., p. 815.
54. *Ibid*., pp. 824–6.
55. *Ibid*., p. 830.
56. Venturi, ed., *Cesare Beccaria*, *op. cit*. note 35, p. 496. The piece appeared in Linguet's *Annales politiques et littéraires*, 5 (1779).
57. It is impossible here to offer a complete history of the writings against torture. See Maza (1993) *Private Lives and Public Affairs*, and Jacobson 'The Politics of Criminal Law Reform'.
58. Jacobson, *op. cit*. note 57, p. 316.
59. The quote comes from Brissot's essay 'Discours sur les moyens de prévenir les crimes en France', the title he gave his 1781 essay for the provincial academy competition in Châlons-sur-Marne when he republished it in his *Bibliothèque du législateur*. As reproduced in Venturi, *Cesare Beccaria*, *op. cit*. note 35, p. 517.
60. Brissot describes the reaction in his memoirs: Claude Perroud, ed., *J.-P. Brissot, Mémoires (1754–1793)*, 2 vols (Paris: Alphonse Picard & fils, n.d.), vol. 1: 222–6.
61. Brissot deployed the same rhetorical strategies as the lawyers writing briefs in the various *causes célèbres* of the 1780s; they not only defended their wrongly accused clients but also increasingly indicted the legal system as a whole. Those writing briefs usually adopted the first-person voice of their clients to develop melodramatic novelistic narratives that drove home their point. The rhetorical strategies are analyzed in depth in Maza (1993) *Private Lives and Public Affairs*.
62. Shelby T. McCloy, *The Humanitarian Movement in Eighteenth-Century France* (1957: 196).
63. Joseph Michel Antoine Servan, *Discours sur le progrès des connoissances humaines en général, de la morale, et de la législation en particulier* (n.p.: 1781), p. 99.

64. As quoted in McGowen, 'The Body and Punishment in Eighteenth-Century England' (1987: 669).
65. Jourdan, ed., *Recueil général des anciennes lois françaises*, 28: 528.
66. Muyart de Vouglans, *Les Loix criminelles de France*, *op. cit.* note 52, p. 796.
67. In the rank of document-level frequency of subjects (1 being highest, 1125 being lowest), the criminal code ranked 70.5 for the Third Estate, 27.5 for the Nobility and 337 for the Parishes; legal procedure ranked 34 for the Third Estate, 77.5 for the Nobility and 15 for the Parishes; criminal prosecution and penalties ranked 60.5 for the Third Estate, 76 for the Nobility and 171 for the Parishes; and penalties under criminal law ranked 41.5 for the Third Estate, 213.5 for the Nobility and 340 for the Parishes. Rank order of subjects comes from Gilbert Shapiro and John Markoff, *Revolutionary Demands: A Content Analysis of the Cahiers de Doléances of 1789* (1998: 438–74).
68. For a general overview, see McCloy, *The Humanitarian Movement* (1957: 202–9).

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