

## The Question of *La Question*

Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France*. Chicago: University of Chicago Press, 2001. Pp. xv, 264. \$42 (cloth), \$20 (paperback).

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Is there a “right” to be free from torture? Sadly, this question is not quite so distant from, or hypothetical for, American judges and legal scholars as it once seemed. Alan Dershowitz, to name only the most prominent example, has recently taken to arguing the somewhat tendentious case that torture can and should be used to save us from the threat of terrorists armed with weapons of mass destruction.<sup>1</sup> We can only hope that this argument will continue to tell us more about our eminently justifiable need to express anger and frustration at the events of September 11, 2001 and their aftermath than it provides us in the way of a practical and effective policy solution to the problem of terrorism. As Richard Posner has recently pointed out, the case for torture is tendentious in the sense that “if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility.”<sup>2</sup> Posner gives the example of a terrorist in possession of information that could be used to prevent the explosion of a nuclear bomb in Times Square.<sup>3</sup> One need not be an *afficionado* of Manhattan to believe that the Eighth Amendment to the Constitution, prohibiting the imposition of “cruel and unusual punishments,” neither would nor should stand in the way of the NYPD’s or FBI’s use of torture in such circumstances.<sup>4</sup>

To mention the Eighth Amendment, however, is to raise a question that is at the heart of Lisa Silverman’s fascinating and

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1. ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002).

2. Richard A. Posner, *The Best Offense*, THE NEW REPUBLIC, Sept. 2, 2002, at 30.

3. *Id.*

4. U.S. CONST. amend. VIII.

imaginative recovery of early modern French thought about the problem of torture (*la question* in French):<sup>5</sup> Since when has torture been thought of as any kind of “punishment” at all, cruel and unusual or otherwise, in the world of the law? That torture has always been a relatively “unusual” practice is clear. It goes without saying that this infrequency should do nothing to acquit history’s torturers from their political and moral culpability. Even at the height of its usage under the Bourbon monarchs of sixteenth- and early seventeenth-century France, Silverman shows, torture was actually administered only rarely.<sup>6</sup> That torture has been thought “cruel” is a much more historically contingent matter. Though Silverman cites an intriguing bit of evidence from as early as 1620 that French magistrates felt pangs of conscience in ordering the use of torture over less painful alternatives such as service in the royal galleys, it was not until the Enlightenment of the mid-to-late eighteenth century that torture and cruelty became synonymous.<sup>7</sup> The equation of torture with sadism and inhumanity was a decidedly non-judicial—indeed even anti-judicial—product of the philosophes and their more general assault on the politics of despotism in pre-revolutionary France.

But it is the last element in the Eighth Amendment<sup>8</sup> that points to

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5. The term “la question,” a euphemism to the modern ear if ever there was one, derives from the Latin *quaestio*, which in Roman law signified an interrogation or inquiry. The French derivative *question* assumed the meaning of an inquiry undertaken by means of physical torture at the end of the fourteenth century. *Dictionnaire Historique de la Langue Française* 3040 (1998).

6. A chart at the end of Silverman’s book gives the figure of 272 cases of torture under discussion in the courts of the province of Brittany during the entire seventeenth century. The same chart indicates 152 instances of torture under discussion in the Parlement (or high court) of Paris during the ten-year period of 1535-1545. For the Parlement of Toulouse, the particular focus of her study, Silverman has amassed an incomplete sample of 162 cases of torture for the seventeenth and eighteenth centuries combined. Whether these figures, which give some sense of the regional variations in the use of torture by French courts, suggest an “unusual” rate of application in any absolute or empirical sense is of course debatable. Certainly Silverman is right to insist that the frequency of torture is a question distinct from its significance and place in early modern French legal culture, just as the cultural significance of capital punishment in the United States today is a question distinct from the actual number of times the death penalty is applied. LISA SILVERMAN, *TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY ON EARLY MODERN FRANCE* 73 (2001).

7. *Id.* at 160.

8. The prohibition on “cruel and unusual punishment” in the Eighth Amendment echoed identical language in the English Bill of Rights of 1689. That language was a reaction to the famous 1685 case of the political dissenter Titus Oates. Oates was convicted of perjury and sentenced to be pilloried repeatedly for his role in fomenting opposition to the alleged “Popish Plot” of the Stuart monarchy. (The punishment of the pillory was a kind of shaming sanction, involving the use of a wooden framework through which the convicted person’s hands and head were inserted, thus subjecting him to the indignities of public display and insult.) Oates’s punishment galvanized opposition to the excesses of the Court of Star Chamber in trials of members of the English gentry, a development that James Q. Whitman has recently situated in the context of a more general Anglo-American tendency towards degrading, low-status criminal punishment. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE*

the gist of the legal and political transformation traced in Silverman's book: "punishment." The characterization of torture as in its essence a form of retribution was central to the philosophes' critique. That characterization marked all the difference between the judicial instrumentalization of torture as a means of facilitating the early modern French criminal justice system and torture's abolition at the end of the eighteenth century in accordance with the moral precept that persons should be treated only as ends in themselves and never as means. Silverman credits one of the French Enlightenment's most famous "Grub Street" pamphleteers, Brissot de Warville, with codifying this moral and political shift in his 1780 *Bibliothèque philosophique du législateur*, a collection of writings on the reform of criminal law. Brissot, she writes, demonstrated that torture "was not a carefully bounded set of practices in law, but any painful practice leading to confession, and . . . that any painful practice, including torture, must be understood to be punishment."<sup>9</sup> Part of the philosophes' critical deconstruction of torture, to be sure, lay in the procedural objection that torture almost always *preceded* the final determination of a criminal suspect's guilt or innocence. But this very basic procedural point, while central to our modern liberal understanding of the proper relationship between crime and punishment, was only a part of the Enlightenment's case against torture, and not even the most important part at that. Silverman wants to show instead that what made possible the French monarchy's two-stage abolition of torture at the end of the Old Regime was an epistemological crisis of a quite broad cultural nature, a breakdown in the nation's philosophical consensus about the relationship between pain, truth, and the body.

At the center of this philosophical consensus was the judicial conviction that pain could usefully be employed to induce truthful confessions from criminal defendants. Thus, Silverman makes the critical distinction between an historical approach to torture that asks whether a particular suspect actually committed the crime of which he or she was accused, and one that asks "whether confessions to murder given under torture were taken to be truthful."<sup>10</sup> This interest in the "truth status" of confessions in the Old Regime French courts, and more specifically in the Parlement (or high court) of Toulouse, suggests the character of Silverman's study as an exercise in the new cultural history, with all of its by now familiar emphases on the construction of meaning, the discursive nature of

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(2003), 29-30, 156-57. Whitman's study appeared as this review was going to press.

9. *Id.* at 170.

10. *Id.* at 12.

law and politics, and the relative or absolute opacity of what “actually happens” out there in what was once known as the “real world.” Not that Silverman is entirely indifferent to the historian’s traditional function of reconstructing the factual course of past events as best she is able: The first chapter of her book is an arresting account of a murder committed on the streets of Toulouse in 1726, resulting in the torture of a man named Jean Bourdil. Silverman skillfully uses this murder narrative to tell the even more complicated story of how the legal system of Old Regime France worked in all its Byzantine detail, a system that rivals the contemporary American law of federal jurisdiction for the prize of seemingly willful complexity. But she is far too sophisticated a historian to believe that the present-day interest of Bourdil’s ordeal is whether he actually committed the crimes with which he was charged, even assuming that such knowledge was available to us.

On the basis of Bourdil’s story and others like it, as well as the evidence presented in the legal manuals that judges (particularly at the local trial level) used to decide whether and how to sentence a defendant to *la question*, Silverman argues that the early modern French judiciary perceived truth, proof, and evidence as all having their location in the human body. It was the task of the judge to “release” truth from the body of the defendant through the application of intense forms of pain.<sup>11</sup> Truth was thus a “unitary fact” that could be extracted *physically* from a suspect, in much the way that a pre-modern dentist would try to yank unwanted teeth from his patients.<sup>12</sup> The same judicial mindset that regarded a quavering voice or shaking hand as potential evidence of guilt, or that called for searching a defendant immediately prior to torture for the presence of any charms that might interfere with the sensation of pain, also approved of the notion that deliberately inflicted pain could and did will out the body’s truth.

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11. There were three principal forms of torture in early modern France, applied to varying degrees in the different regions of the nation and depending on whether the suspect was a man or woman. The *estrappade* (or strappado) involved suspending a person diagonally between a wall and the floor by attaching his feet and hands to rings on both ends, and then stretching the person’s body so as to sever the joints. The *question d’eau* (or water torture) involved a similar sort of slanted suspension of the body, with the added element of several buckets of water forced down the mouth of a suspect so as to cause severe swelling. The *brodequins* or *mordaches* involved the use of a vice that was tightened around the bones of the suspect’s legs. Early modern French torture was also divided into the categories of “ordinary” and “extraordinary” according to whether the trial culminating in a sentence of torture was conducted in public or in secret. Finally, there was a distinction between the *question préparatoire* (torture designed to force a confession from the accused before his guilt or innocence was adjudged) and the *question préalable* (torture designed to solicit the names of accomplices after the defendant had been judged guilty). The former was abolished in 1780, the latter in 1788. *Id.* at 42, 46-47, 203 n.6.

12. Silverman hints at a relationship between judicial torture and medical surgery in her book’s only unconvincing chapter, which I will discuss below.

It is the connection Silverman establishes between this belief in the physicality of truth and the redemptive message of Catholicism that constitutes her most brilliant and interesting contribution in this book. Without the religious conviction that pain and suffering were meaningful and redemptive experiences, Silverman argues, the judicial confidence in the propriety and efficacy of torture would simply not have been able to sustain itself in the way that it did for so long; it lasted until more than a century after certain reforms in French criminal procedure in 1670 rendered the rationale for torture less compelling than it had been before.<sup>13</sup> The tribulations of Christ for humanity's sins served at bottom as the touchstone for a pervasive societal belief in "the sacramentality of suffering and in the ability of physical pain to connect the sacred to the profane."<sup>14</sup> A virtuoso chapter on "Lay Piety and the Valorization of Pain" makes a strong (if not quite watertight) case that popular sentiments about the redemptive value of pain were also shared by the French judicial elite, many of whom were members of the lay confraternities that dotted the religious landscape of early modern France until well into the eighteenth century. As a result of this imbrication of judicial by religious values, torture became not just a widely accepted legal institution but also a prototype of early modern ritual practices more generally.<sup>15</sup>

The religious dimension of this thesis has important implications for our understanding of torture's eventual decline and abolition in France. In contradistinction to John Langbein's influential 1977 study *Torture and the Law of Proof*, Silverman argues that the French monarchy's 1670 criminal law overhaul was not the prime factor in the demise of torture. The real decline in the frequency of torture's application by the law courts preceded those reforms and took place in the period between 1640 and 1660. Notwithstanding that decline, Silverman repeats at several points, torture remained a consistently available instrument of the judicial toolkit until the virtual last gasps of the Old Regime. Silverman thus tries to walk a tightrope between two poles: the undeniable truth that religion and the sacramental value of suffering remained major forces in French popular and elite culture throughout the eighteenth century, and the equally undeniable truth that the desacralization of the monarchy and Enlightenment-style secularization more generally pulled the rug out from under the legs of judicial torture and the

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13. It is worth noting not only that French criminal law permitted the use of torture in specific cases where evidence was lacking to convict a defendant, but also that torture was never *mandated* by royal ordinance either before or after 1670.

14. SILVERMAN, *supra* note 6, at 130.

15. *Id.* at 65.

epistemological consensus on which they stood. Combined with Voltaire's campaign against the use of torture in the notorious Calas affair of 1762<sup>16</sup> and its echoes in the late eighteenth-century critique of royal "despotism," these forces finally brought an end to the use of torture in France. No longer deemed a physical and static property of the body that awaited discovery from without, truth could now be seen as a construct of the human will. Cultural and not legal change proved the decisive factor.

It is difficult in the space of a relatively short review to capture all of the intricacies of Silverman's analysis. This book should be of great interest not only to historians of the body and early modern religion, but also to students of early modern legal history and those interested in the problem of state-inflicted violence. Nonetheless, the book is not without a few weak spots. The chapter on early modern medical understandings of pain fails to establish a substantive connection to the judicial practice of torture. Silverman provides little evidence to support the claim that the witnessing of surgically-inflicted pain by doctors and third-party observers alike became a critical element in the more general characterization of pain as a danger to human society. This is not a mere matter of detail in light of the importance the author attaches to the Enlightenment "discovery" of suffering as a social experience in her penultimate remarks, even if the general point about pain as a (newly) social and political problem is on the whole a convincing one. It might also have been useful for the author to broaden her definition of France and consider the role of racial torture in the early modern French empire: In 1788 the colony of Saint-Domingue (Haiti) witnessed a major scandal over the torture of two female slaves only months before the convocation of the Estates General started Haiti on the road to revolution.<sup>17</sup>

Finally, Silverman's brief but suggestive epilogue about the philosophes and their relationship to modern suffering and political violence seems quite debatable. She writes that the "language of the philosophes has been one of the primary tools available to us in our efforts to contain our violence."<sup>18</sup> This is true but manages to overlook the role that the language of one of the Enlightenment's greatest heroes, Rousseau, was made to serve in justifying one of the

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16. Jean Calas was a Protestant resident of Toulouse who was tortured and subsequently executed on suspicion of having murdered his son to prevent the latter's conversion to Roman Catholicism. The case became a *cause célèbre* as a result of Voltaire's campaign to clear Jean Calas's name posthumously, a campaign that targeted both anti-Protestant religious bigotry and the corruptions of the criminal justice system in eighteenth-century France.

17. Twentieth-century Algeria is far from the only place where representatives of the French state have committed crimes against humanity.

18. SILVERMAN, *supra* note 6, at 180.

central episodes in the history of modern state violence: the Reign of Terror of 1793-1794. Silverman then closes by criticizing the philosophes for drawing too much attention to themselves in their campaign against torture, thereby forgetting torture's actual (nameless and faceless) victims. Our modern humanitarian sensibility and revulsion against state violence and human misery in general, she suggests, is plagued by "compassion fatigue" and has left us "mired in our own feelings, fascinated by our own emotions, and without a compassionate public language with which to talk about pain and suffering."<sup>19</sup> Though again not without merit, this claim strikes me as more than a touch too cynical. We may not remember all of the "peasants and artisans, the millers and goldsmiths and cowherds" who were subjected to torture in early modern France, but because of Voltaire we still remember the Protestant Jean Calas.<sup>20</sup> And through Calas it is possible for us to also identify with the many other victims of torture and state-sponsored terror, across time, space, and the ravages of modern history. True enough, it is easier to talk about the need for compassion than to actually exercise it. But in a world in which political violence of one sort or another is still so much a pervasive fact of life, surely we have more serious problems to worry about than the sentimental excesses of humanitarianism.

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19. *Id.*

20. *Id.*

