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Joshua E. Kastenberg
University of New Mexico

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AN ENLIGHTENED ADDITION TO THE ORIGINAL MEANING: VOLTAIRE AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Joshua E. Kastenberg*

The influence of pre-1776 English history on American law has been a subject which courts often analyze. Nowhere is this judicial approach more pronounced than on the subject of capital punishment. Since the 1972 Supreme Court decision in Furman v. Georgia, the Eighth Amendment's prohibition against cruel and unusual punishment in capital punishment cases has undergone a continuous historic analysis by both the courts and legal commentators. This analysis originally centered on the influence of pre-1776 English history on the founders of American law. For example, Justice Marshall's concurrence in Furman stated that the Eighth Amendment's prohibition against cruel and unusual punishment was derived from English law. Furthermore, all of Furman's concurring opinions cited Anthony F. Granucci's important 1969 article, which was the first concise exploration of the influence of English history on Anglo-American law in the capital punishment context. Finally, Furman cites Blackstone six times, illustrating the Court's reliance on the pre-Revolutionary War English law. In this light, a salient question which the Court posed was whether a national consensus against capital punishment existed at the beginning of, or at any time in this nation's history.

The basis for the Court's consideration of this question arises in the 1976 decision, Roberts v. Louisiana. In Roberts, the Court accepted that the Eighth Amendment drew much of its meaning from the concept of "evolving standards of decency that mark the progress of a maturing society". This concept opened the door for further historic examination because, by its very

* Faculty, Milwaukee Technical College, Milwaukee, Wisconsin. B.A. 1989, University of California, Los Angeles; M.A. 1991, Purdue University; J.D. 1996, Marquette University Law School. The author wishes to thank Professor Christine Wiseman for her advice and ideas, as well as Elizabeth Chan for her recruiting.
1. 408 U.S. 238 (1972).
2. For example, in Furman, Justice Brennan wrote that, "[w]hen this country was founded, memories of Stuart horrors were fresh and severe corporal punishments were common... The practice of punishing criminals by death, moreover, was widespread." Id. at 305.
3. Id. at 316 (Marshall, J., concurring).
meaning, "evolving standards of decency" denotes an absence of consensus. As a result, since 1976 numerous legal scholars have attempted to define the meaning behind the original prohibition of capital punishment as a basis for either accepting or delimiting the practice. The position of this article is that at the founding of this nation, albeit for a brief period, a consensus against capital punishment existed and was influenced by Enlightenment philosophers, especially Voltaire.

Recently, two scholars of European legal history, John E. Witte, Jr. and Thomas C. Arthur, have theorized that the Eighth Amendment reflected Sixteenth Century Protestant theological doctrine. Their argument is that early Protestant doctrine serves as a signpost to understanding the Eighth Amendment's original intent because a religious connotation exists within the text. Witte and Arthur concluded that the founders, as Protestants, intended that capital punishment remain a viable part of criminal sentencing.

Neither the above interpretation nor the Furman Court's assertion of an absence of consensus withstand a comprehensive study of continental European influences on early American law. The influence of Enlightenment-era philosophy had a tremendous impact in early American law. Any complete study of American legal history includes the philosophies of John Locke, Montesquieu, and Jean-Jacques Rousseau because of their influences on the founders. Any study of the Eighth Amendment's prohibition against cruel and unusual punishment should not only include an examination of their works, but should also include a study of Francois-Marie Arouet, otherwise known by his pseudonym, Voltaire (1694-1778). Voltaire not only wrote on the subject of punishments, but had direct contact with some of the nation's founders, namely Benjamin Franklin and Dr. Benjamin Rush. This article centers on the influences of the Enlightenment through Voltaire on both the

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7. In Gregg v. Georgia, 428 U.S. 153 (1976), in which the Court ruled on the constitutionality of the death penalty, the historic analysis followed Granucci's argument that the framers who adopted the English phrasing in drafting the Eighth Amendment were primarily concerned with proscribing tortures and other barbarous methods of punishment. Id. at 170 (citing Granucci, at 842).

Then, in Woodson v. North Carolina, 428 U.S. 280, 286 (1976), the Court held that the framers intended the states to follow the common law practices of mandatory death sentences for prescribed crimes including intentional homicide, treason, and piracy. Id. at 289.

Finally, in Roberts v. Louisiana, 428 U.S. 325 (1976), the Court reiterated the Eighth Amendment as drawing its meaning from the phrase, "the evolving standards of decency that mark the progress of a maturing society." Id. at 336 (citing Trop v. Dallas, 356 U.S. at 101).

8. John E. Witte, Jr. & Thomas C. Arthur, The Transformation of Western Legal Philosophy in Lutheran Germany, 62 S. CAL. L. REV. 1573 (1989). The authors argue that Protestant reformers urged political rulers to develop comprehensive laws that defined and prohibited all manners of offense against the person or the property of another and to enforce these laws swiftly and severely. This legal philosophy rejected the Catholic belief set by St. Thomas Aquinas: that law is an ordinance of reason for the common good. Furthermore, the Protestant reformers believed that punishment served four purposes: (1) the order of justice in God; (2) the removal of sinners or evildoers from society; (3) to set an example reminding society of God's wrath and to fear his punishment; and (4) as an offshoot of divine judgment. Id. at 1629.

framers of American law and on the Eighth Amendment’s prohibition against cruel and unusual punishment.

Before discussing the weight of Voltaire’s influence on the law makers in the early republic, it is first important to envision a general picture of both Enlightenment philosophy and the experiences of Voltaire in Eighteenth Century France. Therefore, in Part I, this paper examines Seventeenth and Eighteenth Century Enlightenment philosophy on criminal punishment, as well as the philosophy of Voltaire. Part II addresses a similar exploration of the impact of this philosophy on the writers of American law. This influence is examined in a three-tiered approach, analyzing the impact of Voltaire on the framers of the Constitution, the laws of the colonies, and on society in general.

I. THE EUROPEAN ENLIGHTENMENT AND CRIMINAL PUNISHMENT

A. Objective

The objective of philosophers during the Enlightenment was to attack the political and social system of Seventeenth and Eighteenth Century Western Europe. This system had evolved over the previous millennium, creating unmoving class structures, absolutist governments, persistent wars, and an environment that placed the greatest hardships on the lowest echelons of society. Enlightenment advocates believed that anything not useful to humanity, or that did not promote human happiness, was not justifiable. They also argued that nothing was beyond rational improvement. The combination of these two beliefs led the Enlightenment-era philosophers to conclude that institutions such as absolutism and severe religious doctrine had outlived their utility. In expounding these arguments, the French philosophers of the day, including Voltaire, characterized themselves as independent thinkers committed to the improvement of their fellow men. Among their adherents were Benjamin Franklin and Thomas Jefferson.

In essence, what the Enlightenment philosophers had rebelled against was a product of the long religious wars during the previous two centuries. From the Middle Ages to the Thirty Years War, European legal thought was rooted in religion. The advent of the Protestant Reformation in 1517 sig-

10. See, e.g., W. H. Lewis, The Splendid Century 64-81 (1959). For the past forty years, Lewis’s work has been considered the most salient material on the subject of the absolutism of Louis XIV. In his chapter entitled “The Base of the Pyramid” he describes the requirement of taxation and service under the crown. For example, proportionally, the poorest villager could expect to pay the highest taxes. Id. at 68.


12. Id.

13. Id.

significantly altered the underlying philosophies of criminal punishment. Unlike the Catholic Church, early Protestantism did not embody institutions such as confession or penance.15 Thus, the Protestant faith placed a premium on personal responsibility and advocated the notion of permanent sin.16 The belief in punishment as a rectifying agent became more pronounced.17

Foremost among the Protestant reformers to have an effect on criminal punishments was the lawyer John Calvin (1509-1564). Calvin accepted the traditional doctrine of naturalis legis testimonium, which held that primal natural law had been imparted to men by God, and that the Scriptural Commandments were its proof.18 He believed that every human had an innate depravity which led persons to sin. Moreover, this depravity prepared individuals for the commission of atrocious and innumerable crimes.19 Calvin further argued that government was a guardian of the law, and as such, owed a duty to God to enforce the laws by "justly meting out punishment."20 In this light, Calvin examined the theologic question of whether Christian justice permitted killing a criminal in the face of the commandment, "thou shalt not kill."21

If we understand that in the infliction of punishments, the magistrate does not act at all from himself, but merely executes the judgments of God, we shall not be embarrassed with this scruple... To hurt and to destroy are incompatible with the character of the godly; but to avenge the affliction of the righteous at the command of God is neither to hurt nor to destroy. Therefore, it is easy to conclude that in this respect, magistrates are not subject to the common law, by which the Lord binds the hands of men, he does not bind his own justice, which he exercises by the hands of magistrates.22

Thus, Calvin argued that governing bodies possessed the duty of punishment, including killing criminals, because vengeance was a legitimate and not biblically incompatible tool of government.


16. Id. Luther's legal philosopher, Philip Melanchthon, and John Calvin both asserted that the law condemns sinners to the "process." Witte & Arthur, supra note 9, at 438. The author theorizes that the term "process" attached to the belief in the divine law in which one would either ascend to heaven or descend to hell.

17. Witte & Arthur, supra note 8, at 1629.

18. JOHN CALVIN, ON CIVIL GOVERNMENT 44 (McNeill trans. 1951) (1538).


20. Id.

21. Id. (citing Genesis 9:6; Exodus 21:12).

22. CALVIN, supra note 18, at 44.
B. Protestantism's Impact on English and Colonial Law

In England, as in the North American colonies, the Calvinist view of punishment found its adherents among both the Anglican leaders of the Tudor Reformation and the Puritans. For example, the Archbishop of Canterbury, Bishop Cranmer, wrote in 1680 that: "The law uttereth and sheweth us unto ourselves, and maketh evident, plain, and open before our eyes, our own wickedness, misery, and wretchedness, [and] accuseth, condemneth, killeth, and casteth us down headlong into the hell-fire."23 This recitation of the purposes of law was consistent with Calvin's theories.

Like Calvin, English Puritan jurists in both Europe and the New World also argued that state magistrates were God's vice regents in the world.24 These magistrates represented "God's authority and majesty on earth".25 Thus, they believed that "just as the provisions of the criminal law reflected God's will, so too did the accompanying punishment."26

Parliament's main remedy for crime was lengthening by statute the list of capital felonies. Thus, the reigns of the last two Stuart Kings and the first three Hanoverians added approximately 190 capital offenses to the fifty or so existing in 1660.27 Moreover, a number of Eighteenth Century punishments extended beyond the traditional hanging and included other mutilations. Under the 1752 Act of King George II, public display of the deceased was a recognized addition to the sentence of death. What this meant in numeric terms was that between 1749 and 1799, there were a total of 1,696 persons executed in London alone.28 This severity, though numerically less in the Colonies, extended its reach to the areas of the globe under English domain.

Like France, "the development of English religious thought in the Seventeenth Century bore a close relationship to the transformation of English political and legal institutions."29 Although an extensive examination of Seventeenth and Eighteenth Century English history is beyond the scope of this article, it must be stressed that the numbers of persons tried and executed for felonies increased. Events such as Cromwell's revolution, the bloody assizes of James II, and the Glorious Revolution resulted in social upheavals. The need to stabilize society was reflected in English law. What distinguished England from continental Europe is that absolutism never completely took root and legal compromises with the interests of the individual had to be

23. Witte & Arthur, supra note 9, at 442, (citing the CATCHESIM OF SIR THOMAS BECON (John Ayre, ed. 1844) (1648)). Becon was advisor to Archbishop Cranmer.
25. Witte & Arthur, supra note 9, at 438.
26. Id.
28. Id. at 276.
29. Harold J. Berman, The Impact of Enlightenment on American Constitutional Law, 4 YALE J. L. & HUMAN. 311, 317 (Summer 1992). Berman writes that English thought was deeply influenced by Calvinist ideology, and viewed the law as a means to maintain the Reformation. The spirit of absolute liability was endemic to English law as a result. Id.
achieved. These compromises culminated in the 1689 English Bill of Rights which read “that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Yet, given the court records and the methods of punishment, English law had a loose interpretation of what “cruel and unusual punishment” meant.

These changes to the English law occurred at a time when the governments of Continental Western Europe were orienting toward absolutism. Thus, England, in practice of punishments, mirrored the continent in its harshness. The basic need to cement religion into law, as well as to make law an instrument for political stability was as pervasive in England as it was on the continent. As a general characterization, these laws were used not only to support the state's will, but also to deflect the increasing social instability caused by population growth. Moreover, as a result of the Counter-Reformation, even Catholic nations such as France adopted Calvinist tendencies in their criminal codes. As a result, Calvin's beliefs — and indeed the prevailing legal systems of the period — came under attack during the period of Enlightenment in the generation after the Thirty Years War.

C. Overview of Enlightenment

Before discussing the influence of Voltaire on the Eighth Amendment, it is helpful to review prevailing attitudes prior to Voltaire as well as those of his Enlightenment contemporaries. These attitudes can be viewed briefly through the writings of Thomas Hobbes, John Locke, Cesare Beccaria, and Voltaire’s rival, Jean-Jacques Rousseau.

Thomas Hobbes (1588-1679), the first of the Enlightenment philosophers, argued that punishment was not intended to be a form of revenge; rather, it was a vehicle for deterrence and an agent of correction. In *Leviathan*, Hobbes specified that “we are forbidden to inflict punishment with any designe, than for correction of the offender, or direction of others.” He also argued for utilitarianism in sentencing offenders noting that “[m]en must look not at the greatnesse of the evill past, but the greatnesse of the good to follow.” Through this logic came the notion that a punishment should reflect the gravity of the crime.

31. Professor Steven Wilf has written that during the 1750s, executions were intentionally made into a public spectacle, and attributes this phenomena as a reaction against a crime wave beginning with the demobilization of troops after the War of Austrian Succession. Steven J. Wilf, Imagining Justice: Aesthetics and Public Executions in Eighteenth Century England, 5 Yale J. L & Human. 51, 53 (1993).
32. See M.S. Anderson, Europe in the Eighteenth Century (1713 - 1783), 160-209 (1987). In an appropriately titled chapter, “Monarchs and Despots: Tensions Within the State,” Anderson concludes that the growth of populations led to instabilities in Western Europe. To counter this, criminal codes became increasingly harsh in their punishments. This was, with the exception of the Netherlands, a universal feature. Id.
34. Id.
John Locke (1632-1704) explained his beliefs on criminal punishment in *The Second Treatise of Government*. Interestingly, in his rationale on punishments, Locke combined biblical statements and Enlightenment philosophy. For example, he quoted from *Genesis*, "[w]ho so sheddeth man's blood, by man shall his blood be shed." Yet, he also argued the Enlightenment proposition that "[e]ach transgression may be punished to that degree and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like." Thus, Locke believed that a punishment should either serve a retributive, a rehabilitative, or a deterrent purpose to be legitimate. This rationale would later influence Beccaria, Voltaire, and ultimately the American legal system.

Jean-Jacques Rousseau (1712-1778) approached the issue of state-run executions in *The Social Contract*. In a chapter entitled "The Right of Life and Death," he stressed that while a guilty person deserved punishment, "there is not a single evil doer who could not be turned to some good." Moreover, in his *Discourse on Political Economy*, Rousseau argued that the prevention of crime resulted from changing human nature and not punishment. He explained, "any imbecile who is obeyed can, like anyone else, punish crimes . . . the true statesman knows how to prevent them."

No single Enlightenment figure influenced Voltaire's arguments against severe punishment more than the Italian priest, Caesar Beccaria (1738-1794). Beccaria, in his essay entitled *On Crimes and Punishments*, qualified his standards for acceptance of the death penalty with two conditions. First, it had to be evident that, even if the individual remains in prison, he still remains a threat to the security of the nation. Second, a sentence of death could be acceptable if the execution served as a deterrent to the remainder of society against committing similar crimes. Utilizing these standards, Beccaria concluded that it was impossible to justify the execution of criminals. Moreover, he argued that the death penalty could not be useful because it exemplified barbarity. Finally, the punishment by death was counter-pro-

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36. *Id.* at 9.
41. *Id.* at 46.
42. *Id.* Beccaria wrote, "I see no necessity for destroying a citizen, except if his death were the only real way of restraining others from committing crimes." *Id.*
43. *Id.* at 47. Beccaria concluded that "[t]he death penalty becomes for the majority a spectacle and for some others an object of compassion mixed with disdain; these two sentiments rather than the salutary fear which the laws pretend to inspire occupy the spirits of the spectators." *Id.*
44. *Id.*
ductive to the very ideal of the Enlightenment.\textsuperscript{45} Beccaria did not, however, question the efficacy of the criminal justice systems in Europe as Voltaire would. Yet, his writings served as an inspiration to Voltaire, and the two communicated throughout the later course of their lives.\textsuperscript{46}

\textbf{D. France and Voltaire}

Voltaire in particular advocated a dual-tier attack on the legal system of France. He argued against both the religious influences in law and the law’s purpose of redirecting the increasingly hostile masses of France.\textsuperscript{47} He despised organized religion and saw it as the basis for evil.\textsuperscript{48} He categorized Calvinism as the worst offender, although he also criticized the Catholic Church.\textsuperscript{49} Coupled with his angry beliefs toward the organized religions of France, he was equally adamant about ridding the influence of religion in the law. However, to understand Voltaire’s philosophy on criminal punishments, it is first helpful to review his place in French society.

Voltaire was born in Paris on November 21, 1694 to a middle-class family. He attended a Jesuit college in Paris with the intention of becoming a lawyer.\textsuperscript{50} As a result of his published plays, which were scathing criticisms of French government, he was imprisoned in 1726 and then exiled to England.\textsuperscript{51} In England, his love of literature, together with the encouragement of a friend in parliament, led him to the study of philosophy. In his self-schooling on the subject, he came to read and admire both Locke and Hobbes.\textsuperscript{52} After leaving England of his own accord, he resided first in the Netherlands, and then Geneva. He served as an advisor to Frederick the Great, King of Prussia (1712-1786); later advised Catharine the Great of Russia (1729-1796), and returned to France in the late 1750s as a popular hero among Enlightenment scholars and educated youth. His wit and cynicism captured audiences throughout Europe. His offensive humor, which was admired in the edu-

\textsuperscript{45} Id. As evidence of Beccaria’s dedication to Enlightenment ideals, he wrote: “If these monarchs, I say, suffer the old laws subsist, it is because of the infinite difficulties involved in stripping from errors the venerated rust of many centuries. This is surely a reason for enlightened citizens to desire, with greater ardor, the continual increase of their authority.” Id. at 52.

\textsuperscript{46} As an example of this correspondence, Voltaire wrote to Beccaria on the nature of religion in criminal law, “what an abominable jurisprudence is that which sustains religion only by means of the public executioner.” Correspondence letter #15044 (May 30, 1768), in 41 \textit{Voltaire} (Besterman ed., 1962).

\textsuperscript{47} \textit{Voltaire, Le Siecle de Louis XIV} 109 (1760); \textit{Voltaire, The Age of Louis XIV} 51 (J.H. Brumfit trans., 1963) (1760).

\textsuperscript{48} Id.

\textsuperscript{49} Id. Voltaire, in his \textit{Galimatias Dramatique} characterized himself, as “imagining himself as one of his favorite persons, a Chinese official. After listening to the religious philosophies of the Jesuits, Jansenists, Quakers, Anglicans, Lutherans, Moslems, and Jews, he has them all locked up in an insane asylum and wishes for a plague on all their houses. . . . He reasons that the crimes of Christianity are not an accident, but the essence of the religion itself.” \textit{Peter Gay, Voltaire’s Politics: Poet as Realist} 202 (1978).

\textsuperscript{50} Gay, \textit{supra} note 49, at 202.

\textsuperscript{51} Id.

\textsuperscript{52} Id.
cated classes, targeted the nobility and church. During Voltaire's transition into a philosopher he switched from being a writer of plays to a historian and writer of ideas.\textsuperscript{53} Two of his lasting philosophic works, \textit{Lettres Philosophiques} (1738), and \textit{Dictionnaire Philosophique} (1764), stimulated European thought for over a century after their release. The \textit{Dictionnaire Philosophique} provides the basis for Voltaire's beliefs on the utility and criticism of punishments.

Unlike his Enlightenment contemporaries, Locke, Rousseau, and Montesquieu, Voltaire was directly involved in the events of his day. He was acutely aware of his influence in society and specifically criticized Rousseau and his adherents for failing to act upon their thinking.\textsuperscript{54} Moreover, Voltaire was intimately familiar with the French establishment in all its aspects.\textsuperscript{55} Indeed, he felt that the system of criminal law and punishments in France were too rooted in ancient and oppressive traditions.\textsuperscript{56} Voltaire's dislike of the French legal system was consistent with his other beliefs because in the previous century, the laws of France had developed in response to Calvinist reformation influences.\textsuperscript{57} In particular, he disparaged the "Calvinizing" of French criminal law, in that the law began to mirror the very harshness of Calvinist doctrine, albeit being drawn from a Catholic nation.\textsuperscript{58}

The code of law which governed the French judicial system at the time of Voltaire was the \textit{Ordonnance Criminelle} of 1670.\textsuperscript{59} The \textit{Ordonnance} had been developed by Jean Baptiste Colbert (1651-1690), Louis XIV's controller general of France, and was designed to give the state greater control over the provinces of France and their inhabitants.\textsuperscript{60} Under this collection of laws, criminal penalties were considerably stiffened.\textsuperscript{61} Until the Fifteenth Century, the death penalty and serious mutilation were used only in extreme cases to

\textsuperscript{53} Id.
\textsuperscript{54} Voltaire wrote, "Rousseau writes only to write, and I write in order to act." Correspondence letter # 14117 (Apr. 15, 1767), in \textit{6 VOLTAIRE}, supra note 45.
\textsuperscript{55} \textit{GAY}, supra note 49, at 202.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} In France, the example of this is the repudiation of the Edict of Nantes. In 1598, King Henry IV granted a large measure of religious liberty to the Huguenots. In 1629, Cardinal Richelieu, through the Peace of Ales had the Edict restricted to certain geographic areas. In 1685, Louis XIV revoked the Edict entirely and deprived the Huguenots of all religious liberty. Corresponding with these laws came harsher criminal codes and increasingly oppressive taxation systems. \textit{See generally LEWIS}, supra note 10, at 64-81.
\textsuperscript{59} Id.
\textsuperscript{60} No. 623 \textit{Ordonnance Criminelle} [Criminal Ordinance], St-Germain-en-Laye, aout 1670(1). reg. P.P., 26 aout.
\textsuperscript{61} Id. In the first section, Colbert announced that the purpose of the \textit{Ordonnance} was to unify the different regional criminal codes under the control of the sovereign, Louis XIV. \textit{Id.} at 24.
supplement a complicated system of fines.\textsuperscript{62} As a result of the Ordonnance, both the death penalty and the mutilation of prisoners became the most common of measures.\textsuperscript{63} Historian Peter Gay has argued that this growing harshness "resulted from an increased need to repress the turbulent lower classes, especially the rootless urban population, and to protect private property as a result of increased urbanization which had led to that rootless population."\textsuperscript{64} Also troubling to Voltaire was that the Ordonnance permitted virtually everything into evidence, regardless of nationality.\textsuperscript{65} Moreover, the Ordonnance alluded to the will of God and echoed Calvinist sentiments.\textsuperscript{66}

Voltaire criticized the Ordonnance as too oppressive. In response he wrote, "[l]et the torments of criminals be useful. A hanged man is good for nothing, but a man condemned to public works still serves his country as a living lesson."\textsuperscript{67} Voltaire was also outraged that the execution of innocent persons occurred with what he termed a disgusting regularity.\textsuperscript{68} He disparaged the state’s use of punishments as "monstrous, irrational, and absurd."\textsuperscript{69} In his writings on criminal law Voltaire concluded that leniency was more useful than revenge. In the Dictionnaire, he observed that "of all religions, the Christian should be the most tolerant, but till now, the Christian nations were the most intolerant of all men."\textsuperscript{70} However, in the 1760s, as a result of events in both Toulouse and Abbeville, he undertook an even more direct attack on state conducted executions.

Specifically, a series of two trials in Toulouse and another in the city of Abbeville enraged Voltaire. He concluded that, with the exception of regicide, the execution of criminals served no sane purpose.\textsuperscript{71} The first of the Toulouse trials, known as the case of Calas, occurred in 1760. By today’s standards, the basis for the prosecution seems outrageous. A sixty-three year

Clearly, the centralization of laws under Louis embodied harsher sentencing. Crimes for which one could be put to death were codified under the Titre Premier, De la Competence des Judges: § 22. These included in the order listed: rebellion, interference with police activities, sedition, fueling popular emotions against the sovereign, rioting, fabrication of expenses and accounts, crimes of heresy, murder, forgery, desertion from military duties, refusal to comply with other ordinances, and other causes against the state or true religion (the Catholic Church). Ordonnance Criminelle, supra note 58, at De la Competence des Judges: § 22.

\textsuperscript{62} ISAMBERT, supra note 61.

\textsuperscript{63} Id. Prior to the Ordonnance, execution of persons was approved only for murder, certain heresies, and regicide. There is evidence that the army had a more expansive list. Nonetheless, the French criminal law had not changed between 1291 and 1670. See JEAN BRISSAUD, A HISTORY OF FRENCH PUBLIC LAW (James W. Garner trans., 1915)(citing Ordonnance de 1291, 1303 (Jan 7, 1291)). Prior to 1670, the military courts and law were not incorporated into the French criminal code. Id. See also GEORGE RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 19 (1967).

\textsuperscript{64} GAY, supra note 49, at 285.

\textsuperscript{65} Id. at 285.

\textsuperscript{66} Id. at 285-86.

\textsuperscript{67} VOLTAIRE, Dictionnaire Philosophique 290 (1760).

\textsuperscript{68} GAY, supra note 49, at 307.


\textsuperscript{70} VOLTAIRE, Tolerance, Dictionnaire Philosophique 485 (1760).

\textsuperscript{71} GAY, supra note 49, at 273-74.
old Huguenot cloth merchant named Jean Calas was accused of killing his eldest son.\textsuperscript{72} In actuality, the son had committed suicide but the family had attempted to hide this fact. The murder accusation stemmed from two beliefs:\textsuperscript{73} first, that the family had engaged in a cover-up over the nature of the death;\textsuperscript{74} and, second, that the victim, Marc-Antoine, had desired to convert to the Catholic faith against the wishes of his Calvinist family.\textsuperscript{75}

The Calas family possessed understandable reasons for the cover-up. A person who committed suicide was publicly tried post-mortem, dragged through the streets and then hanged.\textsuperscript{76} Jean Calas wished to avoid this public spectacle and insisted that Marc-Antoine was murdered by an unknown assailant.\textsuperscript{77} On March 9, 1762, Jean Calas was sentenced to die at the stake. This sentence was upheld despite the fact that he maintained his innocence while he was broken on the wheel.\textsuperscript{78} Shortly after Jean Calas's execution, the remainder of the family was placed on trial. Voltaire represented the wife and children. Much of the testimony against the family, Voltaire pointed out, was based on illogical superstitions and hearsay.\textsuperscript{79} Although the introduction of superstitions and rumors violated common sense, however it did not violate French legal procedure under the \textit{Ordonnance}.\textsuperscript{80} After taking the Calas family's defense by funding additional counsel, Voltaire won banishment for them instead of death.\textsuperscript{81} In 1765, the name of Jean Calas was cleared by the authorities, and ultimately, the Calas family was rehabilitated by the French Government and allowed to return to France.

\textsuperscript{72} \textit{Id.} at 273.
\textsuperscript{73} DAVID BIEN, \textbf{THE CALAS AFFAIR} 11 (1960).
\textsuperscript{74} \textit{Id.} Interestingly, the trial attorney, one M. Theodore Sudre belittled the accusation asking, "where in the entire world could there be found five persons so unnatural as to plot, and after calmly eating their supper, carry out in cold blood the murder of a son, brother, or friend? . . . Even lions and tigers protect their young." \textit{Id.} (citing THEODORE SUDRE, \textit{MÉMOIRE POUR LE SIEU JEAN CALAS NEGOCIANT DE CETTE VILLE} 34-37 (1772)).
\textsuperscript{75} GAY, \textit{supra} note 49, at 274.
\textsuperscript{76} \textit{Id.} at 273-74. George Rusche argues that "[e]ven the methods of executing the prisoners became more brutal. The authorities were constantly devising new means by which to make the death penalty more painful". RUSCHE, \textit{supra} note 62, at 19.
\textsuperscript{77} GAY, \textit{supra} note 49, at 273. This insistence was the initial reason for the magistrates to suspect Jean Calas of foul play. \textit{Id.}
\textsuperscript{78} \textit{Id.} at 275.
\textsuperscript{79} \textit{Id.} at 276-77.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} Peter Gay has commented:

The notion of a secret Huguenot conspiracy to assassinate apostates was a ridiculous, superstitious canard; nothing in Jean Calas' life hinted at homicidal tendencies; there was not a particle of reliable evidence that Marc-Antoine had contemplated conversion to Catholicism - no priest ever came forward to claim that he had instructed him or given him communion; there was on the contrary, good evidence that Marc-Antoine had been a morose young man; thwarted in his ambitions for a legal career, by the exclusion of Hugenots from that profession in France, resentful of being compelled to work in his father's business; it was highly improbable that an elderly man of sixty-three could single-handedly strangle a young man of twenty-eight. GAY, \textit{supra} note 49, at 276-77.
Another case which caught Voltaire’s attention was that of the Sivren family in late 1762. There were similarities between the Calas and Sivren cases. Like the Calas family, the Sivrens were Huguenots. Furthermore, their youngest daughter suffered epileptic seizures which the local nuns attributed as signs of her conversion to the “true faith.” However, before this supposed conversion took place, the girl was found drowned in a well. The Sivrens were well aware of the fate of the Calas family and rather than suffer a similar fate, they fled to Geneva. The family was then accused of murdering their daughter to prevent the conversion. As a result of Voltaire’s prodding, however, the French authorities finally acquitted the Sivren family and in 1771 they were permitted to return to France.

The last case Voltaire undertook was that of a less-than-mature Catholic teenager, named the Chevalier La Barre, who resided in Abbeville. La Barre’s crimes were vandalizing a crucifix and serenading a number of parading priests with blasphemous songs. For this, he was burned at the stake in 1766. A copy of the Dictionnaire Philosophique was thrown in after him. Voltaire had troubling connections to La Barre. It was publicized that La Barre possessed copies of Voltaire’s writings. Furthermore, Voltaire’s open criticisms of the three judges resulted in accusations that Voltaire had (without actually knowing La Barre) prompted the youth to conduct the blasphemies. This attribution alone was not stunning because a good number of Frenchmen had read the Dictionnaire. However, in the legal atmosphere of a French court, the Dictionnaire was introduced for the first time in order to show heretical motives behind La Barre’s behavior. The introduction of such evidence comported with the Ordonnance Criminelle, which freely admitted almost everything into a court.

More than any previous case, the La Barre verdict angered Voltaire. He would later tell Beccaria that although Calas — if truly guilty — would

82. Id. at 277-78. Peter Gay characterized Voltaire as not letting the matter die. He was constantly writing and editing memoranda. He accused the French of apathy because they shuddered at injustice and then attended the opera. He reminded France again and again of the realities they wanted to forget. Id. at 277.
83. Id. at 278.
84. Id. at 278-79.
85. Id. at 279.
86. Id. at 280.
87. DOYLE, supra note 69, at 55. That a copy of the Dictionnaire Philosophique was found among La Barre’s belongings caused trouble for Voltaire. The judges at the trial suggested that Voltaire bore some of the burden for the crime. Moreover, Voltaire countered, “of the three judges who gave this sentence, two of them were absolutely incompetent. One of them for being the declared enemy of the young people’s families; the other who had purchased the judicial robes, his principle employment was that of a dealer in bullocks and hogs. The third judge, intimidated by the two others, had the weakness to subscribe to their sentence. See VOLTAIRE, COMMENTAIRE (Besterman trans., 1969)(1773).
88. DOYLE, supra note 69, at 56.
89. In a later edition of the Dictionnaire Philosophique, Voltaire wrote:
When the chevalier de La Barre, the grandson of a lieutenant general of the army and a young man of much wit and great expectations, but with all the thoughtlessness of an
have deserved his fate, La Barre, who was guilty, did not. Following the death of La Barre, Voltaire solicited the enlightened minds of France to produce a model criminal code in which justice was based on blind reason and humanity.

E. Conclusion

Voltaire formed his beliefs over a lifetime, observing the French criminal justice system; however, his writings were universally popular from the Russia of Catharine the Great to the new American Republic. He was a reformer in the Enlightened sense, and as such would be a voice in the formulation of laws in the late Eighteenth Century. A decade after his death, he was venerated by the revolutionaries who stormed the Bastille. He was also venerated by some of the founders of America. Although direct proof does not exist of a national consensus against capital punishment in post-revolutionary America, this examination of Eighteenth Century French legal thought, "sets the table" for suggesting that such a consensus existed. The experiences and writings of Voltaire had a significant impact on the new Republic's creators of law, if only for a brief period. This impact occurred not only because the Republic's socio-religious environment was somewhat similar to France, but also because both Voltaire and the leadership of America shared similar ideals.

II. Voltaire in American Law, Politics and Society

Prior to the Revolution, the laws of the individual American colonies more or less resembled English law. However, the new Republic's criminal laws had to adjust to a society which desired to discard the harsher vestiges of the English legal tradition. These desires were very much part of the revolutionary spirit expressed in the Declaration of Independence. While it is true that prior to the Revolution, the northern colonies recognized fewer capital crimes than were recognized in England, the numbers of such crimes remained a significant part of the legal landscape in the colonies. Although the numbers of capital offenses were significantly reduced following the American Revolution, this punishment remained a source of debate in the states and ultimately American society.

unbridled youth, was convicted of singing impious songs, and even of passing a procession of priests without taking off his hat, the judges of Abbeville decreed not only should his tongue be cut out, his hands cut off, and his body burned in a slow fire . . . This adventure happened not in the thirteenth century, or in the fourteenth century, but today in the eighteenth . . . Foreign nations judge France by her plays, novels, pretty verses . . . They do not know that there isn't a nation more cruel at the bottom, than the French.

Voltaire, supra note 11, at 492.

90. Voltaire, supra note 46, correspondence letter #15044 (May 30, 1768), in 41 Voltaire, supra note 45.


The Enlightenment's — and for that matter Voltaire's — influence in early American law and politics can be established by studying three different areas. First, it should be noted that Voltaire had some influence on popular society as a whole. Second, Voltaire was read by, and corresponded with, some of the more influential founders including Franklin, Jefferson, Dr. Benjamin Rush, John Adams, and James Madison. Finally, Voltaire's Enlightenment philosophy was incorporated into some of the individual state laws. Each of these areas lend weight to the argument that a consensus against capital punishment was established in American law, society, and politics.

A. Voltaire's Influence in American Law

American legal historian, Melvin I. Urofsky, has argued that the ideas of Voltaire received a sympathetic hearing in the early republic among those interested in abolishing the death penalty. In addition to their attempts to abolish the death penalty, these same individuals set about reforming the rules of evidence for capital trials. All of the former colonies adopted hearsay rules that were designed to exclude the type of evidence brought into the Calas and Sivren cases — as well as the Salem Witch trials.

Historian Lawrence Friedman writes that it was during the revolutionary period that the many rules of evidence received their new formulation. These formulations resulted in part from the theory of checks and balances, one of the central tenets of the founders' philosophy. For instance, the hearsay rule became one of the more dominant rules of the law of evidence during that period; it was a general consensus that juries should not hear second-hand evidence, nor nonsensical impossibilities.

Historian Kermit Hall — who does not mention Voltaire by name — wrote in detail of the reform efforts of Dr. Benjamin Rush. As noted in detail below, Dr. Rush was a follower of both Voltaire and Beccaria and desired to modify the American legal system consistent with the aspirations of the Dictionnaire Philosophique. Readers might question why the hearsay rule arises in a capital punishment context at all. The answer is that the laws of hearsay and capital punishment were intertwined because many persons

96. Id. See also BEVERLY ZWEBEN, HOW BLACKSTONE LOST THE COLONIES: ENGLISH LAW, COLONIAL LAWYERS, AND THE AMERICAN REVOLUTION (1990). However, James Q. Whitman argues that, "there is little point in trying to identify the underlying logic of American legal thinking in the Revolutionary era. That legal thinking was a confused melange . . . We must accept the fact that the American Revolution, like most upheavals was inspired by a poorly-digested farrago of ideas, without inner logic." James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?,” 58 U. CHI. L. REV. 1321, 1366-68 (1991).
97. FRIEDMAN, supra note 95, at 153.
99. See infra text accompanying notes 142-47.
were put to death on the admission of evidence. Importantly, the adoption of common-sense hearsay rules did not change the overall moral argument. Thus, the moral question of a state executing its prisoners remained largely the same after the Bill of Rights as prior to the modifications of the legal system.

Before discussing reform efforts in further detail, it is necessary to understand the backdrop for the evolution of American law from the pre-Revolutionary period to the new Republic. This background is helpful in understanding the development of a consensus against capital punishment.

American society was dissimilar from French society in several fundamental respects. Nonetheless, the framers of American law were confronted by some of the same stringencies that characterized European law. Moreover, it is important to first note that long before 1776, the American colonies had created a substantial amount of law. The law of God and the Bible were important sources of colonial law, and the application of these laws occurred in a Calvinist setting. Colonial America had an interest in controlling social deviancy. Unlike the situation in France, where crimes against property were treated with utmost severity, crimes of biblical sin were paramount in America. The harsh effect of the application of punishments, however, was similar between America and France.

In the Massachusetts colony, for example, adultery, illicit fornication, and sodomy were capital crimes. Homicide was not universally a capital crime and the punishments for homicide were less than for criminal deviancy. For example, in 1650, one Francis Brooke was convicted for killing his unborn son and mangling his wife with a pair of tongs. For these crimes he was given only a stern warning from the Massachusetts court. Yet in the trial of Thomas Graunger in 1642, the defendant was executed for committing "buggery . . . with a mare, a cowe, two goates . . . and a turkey." Equally telling was the 1660 case of George Spencer of New Haven who was executed for bestiality. The evidence against him was that both he and a piglet possessed a deformed eye. To the court, this was convincing evidence that Spencer had had his way with the piglet’s mother and both were put to death. As in the Calas and Sivren cases, these colonial trials had allowed superstitions and unwarranted stereotypes into evidence.

The introduction of Enlightenment philosophy was a product of the period. The colonies were drifting away from England by 1750, and Enlightenment philosophy filled a growing vacuum for legal scholars in the new world.

100. Id. at 26-27.
101. Id.
102. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660 114 (1983) (citing Maryland v. Francis Brooke, 10 Arch. 464, 488 (1656)).
103. Id.
104. CHAPIN, supra note 102, at 128 (citing Plymouth v. Thomas Granger, 1 Conn. Col. Rec. 159 (1642)).
105. Id. at 128 (citing New Haven v. George Spencer, 1 New Haven Col. Rec. 62 (1641)).
106. Id.
107. Id.
By the 1760s, a general colonial revulsion to the imported English criminal laws had grown to the point where a challenge to the entire legal system was inevitable.

Evidence of a dramatic shift from English law exists in the criminal codes of Pennsylvania and Massachusetts. The 1710 Pennsylvania Charter of Laws made capital offenses of social deviancies such as sodomy and buggery, as well as criminal actions such as highway robbery.\(^{108}\) However, in 1782, the Pennsylvania legislature demoted crimes related to social deviancies and burglaries to a category of offenses punishable by imprisonment and forfeiture of real estate.\(^{109}\) Moreover, in 1789 all homicides except for those in the first degree were exempt from capital status.\(^{110}\) Finally, the Pennsylvania legislature determined that the addition of "unremitting solitude and laborious employment will contribute as much to reform as to deter."\(^{111}\) This language originates from both Beccaria and Voltaire.\(^{112}\)

Massachusetts also achieved a consensus about the lessening of criminal punishments. Unlike Pennsylvania, which had less of a Calvinist influence because of that state’s Quaker origins, Massachusetts criminal law was influenced by Puritan beliefs. On the surface, the Puritan settlers held sacred everything which Beccaria disavowed, and they despised what Beccaria represented.\(^{113}\) Yet the movement against capital punishment had many adherents in post-revolutionary Massachusetts.\(^{114}\) For instance, "[i]n a speech before a joint session of the legislature in 1793, Governor Hancock called on the representatives to abandon the existent colonial system and impose Beccaria’s method."\(^{115}\) Although the legislature did not comply, the fact that the governor had evoked Enlightenment arguments demonstrated that there was a growing consensus against capital punishment in the most Calvinist of all states.

Virginia also contemplated a prohibition against capital punishment. "When the Virginia delegates met to consider the United States Constitution, Patrick Henry was a vehement objector to the lack of a Bill of Rights. Fearing the use of “tortures” and “barbarous” punishments, he specifically complained about the lack of a prohibition against cruel and unusual

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109. The act of September 15, 1786, placed crimes against nature, robbery, and burglary as punishable by hard labor. The legislature noted that all of these crimes were capital at the time of the Revolution. See An Act Amending The Penal Laws Of This State, ch. MCCXLI, 1786 Pa. Stat. reprinted in Pa. Stat. ch. MCCXLI, vol. XII at 280-90 (Mitchell & Flanders 1810).
110. Id. at 573.
111. Id. at 531.
112. See Voltaire, supra note 11 at 485.
114. Id.
115. Id. at 1200.
Although Virginia would later accept the death penalty’s viability, the ten years of debate evidences the strong influence of Enlightenment on this state.

The question which invariably arises is what does this type of information prove? First, the laws of the individual states in the early republic were moving away from capital punishment. Second, that these laws were influenced by Voltaire — along with others such as Beccaria — through Enlightenment philosophy. And yet, examining state laws is only one of three means of proving the existence of a consensus against capital punishment in the early republic. In order for this study to be complete, it must review the societies within those states of the early republic.

B. Voltaire’s Influence on American Society

The American interest in Voltaire began with his non-controversial writings. However, as these works of social import became more available, they also became more popular. This phenomenon resulted because the founders of American state and federal institutions were practically concerned with certain endemic problems related to religion and the natural rights of man.117

Historian Mary-Margaret Barr has conducted the only published survey of Voltaire’s influences in America by studying the news media of the day.118 She concluded that newspapers and magazines were the chief purveyors of information to a much larger number of more or less casual readers in their homes, in places of business, and notably in the inns.119 Articles about Voltaire and excerpts from his writings which appeared in the newspapers were read by many people who would have never viewed any of his works in

116. Granucci, supra note 4, at 841 (citing J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 447-48 (2d ed. 1881)). Patrick Henry made the resounding argument that:

In this business of legislation, your members of Congress will lose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] Declaration of Rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishments . . . They may introduce the practice of France Spain, and Germany . . . [T]hey will tell you that there is a necessity of strengthening the arm of government, that they must have a criminal equity . . . [emphasis added].

Id.

Although there is no proof of Patrick Henry’s knowledge of Voltaire, this language echoes Voltaire’s criticism of the Criminelle Ordonnance from the previous decade. Moreover, the author posits that Patrick Henry, like the majority of Revolutionary figures, knew of Voltaire and were thus likely to be influenced by his writings.

117. Mary-Margaret Barr, Voltaire in America 11 (1941). Barr writes that Voltaire’s commentary on Beccaria’s salient On Crimes and Punishments was translated into English and widely read in America. Id. This is evidenced by John Adams quoting both Voltaire and Beccaria while defending soldiers accused of fomenting the Boston Massacre, and that Thomas Jefferson adopted enlightenment views on proportionality into the Virginia sentencing scheme. See Chris Baniszewski, Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment’s Proportionality Requirement, 25 Ariz. St. L.J. 929, 939 (1993).

118. Barr, supra note 117, at 11.
119. Id.
book form. Moreover, after the establishment of the new republic, more businessmen opened book and stationery stores than ever before. Barr studied that group of businessmen and found that along the Atlantic Coastline, numerous booksellers advertised Voltaire. In the course of her work, she found that Voltaire appeared in American writings from 1750 onwards. By the time of independence, his writings had become well known, even among the lower classes of the revolution.

The earliest American advertisement for one of Voltaire's works, a biography of "Lewis XIV," appeared in the November 13, 1752 edition of the New York Mercury. In 1775, a twenty-four volume collection of Voltaire's works was advertised on several occasions in both the New York Gazette and the Weekly Mercury. A translation of his Dictionnaire Philosophique was announced in the New York Independent Journal in 1787. Thus, the American public had become acquainted with Voltaire in the years between 1750 and 1787.

How Americans viewed Voltaire is equally interesting. Not all opinions were complimentary, although those which disparaged him tended to do so because of his religion. One of the earliest descriptions of Voltaire that appeared in the Newport Mercury was odious in tone, yet the bulk of the descriptions were complimentary. Other attacks from the clergy were typified by their accusations of atheism. In Boston Magazine, Voltaire was characterized as, "treating everything connected with religion, with constant derision, yet he undertook and performed noble things in behalf of the most essential rights, privileges, and interests of mankind; but these virtues were tarnished by his excessive vanity and boundless avarice." Yet Voltaire would have enjoyed this criticism, because even his critics attributed him with a wide range of talents.

120. Id.
121. Id. (citing NEW YORK MERCURY, 13 November 1752, microformed on EARLY AMERICAN NEWSPAPERS (Readex Microprint Corp. 1983)).
122. Id. (citing NEW YORK GAZETTE, 1775, microformed on EARLY AMERICAN NEWSPAPERS, (Readex Microprint Corp. 1983)).
123. Id. (citing NEW YORK INDEPENDENT JOURNAL 1798, microformed on EARLY AMERICAN NEWSPAPERS (Readex Corp. 1983)).
124. Id. For example, in February 1792, an article in the New York Magazine read, "death . . . has put an end to the blasphemies of that writer, so celebrated for his uncommon talents, so culpable on account of the detestable use he made of them; of the famous man, who in the sight of all Europe, spent his whole life defending and propagating impiety. Id. (citing 1 AMERICAN PERIODICALS SERIES: 18TH CENTURY (University of Michigan Microfilms 1942)).
125. Id. This description read: "Voltaire is a wonderful compound of a man, half infidel, half papist; he seems to have no regard for christianity, yet compliments Popery at the expense of his understanding." Id., citing NEWPORT MERCURY, April 6, 1767 (microfilmed on 1 AMERICAN PERIODICALS SERIES: 18TH CENTURY (University of Michigan Microfilms 1942)).
126. Id. (citing CHARACTER AND DEATH OF M. VOLTAIRE, BOSTON MAGAZINE (July 1784), microformed on AMERICAN PERIODICALS SERIES, supra note 124).
C. Voltaire’s Influence on the Founders

Historian Louis P. Masur has argued that numerous Enlightenment figures had addressed the problem of severe punishments, and that “Americans undoubtedly participated in this transatlantic revolt against harsh penalties.”127 He has further argued that “whatever the Enlightenment entailed, it certainly promoted a belief that society was badly in need of both alteration and amelioration.”128 For America, this meant creating prohibitions against cruel and unusual punishment. More specifically it involved recognizing that capital punishment was a violation of any such prohibition. This is where Voltaire had lasting influence.

Voltaire’s influence on the founders of the Constitution was fairly widespread. Dr. Benjamin Rush, for example, saw Calvinism and its influences as a danger to the new republic. Although he never renounced Christianity, he argued the newer Unitarian Church tenets that the eye for an eye commentary was a prediction rather than a statement justifying executions.129 In 1807, Thomas Jefferson listed Beccaria’s works as “essential to an understanding of the organization of society into a civil government.”130

However, it was Benjamin Franklin on whom Voltaire may have had the most pronounced influence. He once wrote to Benjamin Franklin, “I ask you if we could not diminish the number of offenses by making punishments more shameful and less cruel.”131 Franklin was an adherent of Enlightenment philosophy and belonged to a group of thinkers known as the philosophes. By 1760, Voltaire had become, one of the leading spokesmen for the Enlightenment. Moreover, Franklin was well acquainted with the Calas and Sivren cases.132 In 1764, he wrote to an associate, Colonel Henry Bouquet, that Voltaire had written on tolerance and laws as a result of the miscarriage of justice in the Calas case.133 Moreover in the collections of Franklin’s papers, there are several references to Voltaire between 1760 and his death.134 In fact, Franklin proposed to build a statute of Voltaire in Philadelphia after the philosopher’s death in recognition of Voltaire’s inspirational contributions to the nation’s laws.135

Franklin and Voltaire actually met on two separate occasions. In 1778 they were initiated into a Parisian philosophy and science fraternal order known as the Lodge of the Nine Sisters. At this meeting, Voltaire blessed Franklin’s grandson with the statement, “God and Liberty.”136 At a later

128. Id.
131. 43 Voltaire, supra note 48, at correspondence letter #15870 (Aug. 28, 1771).
132. Barr, supra note 117, at 34.
133. Id.
134. Id.
135. Id. (citing 22 Franklin Papers No. 179 (American Philosophical Society 1770)).
136. Barr, supra note 117, at 34.
open meeting of the Academy of Sciences, Voltaire and Franklin met for the first time in public. John Adams, who was present, characterized the relationship between the two as one of great philosophic brothers, comparing them as kindred members of the bygone age of classical Athens.\(^\text{137}\)

Adams too was influenced by Voltaire, and wrote of him with praise during the period of the Revolution.\(^\text{138}\) George Washington acquired a copy of the *Lettres Philosophique* and *Histoire de Charles XII* from Voltaire.\(^\text{139}\) Finally, the author of the Bill of Rights, James Madison (1751-1836), was well acquainted with Voltaire’s philosophy.\(^\text{140}\) Indeed, his library contained most of Voltaire’s major works.\(^\text{141}\) Historian Harold J. Berman rightly states that Madison introduced democratic and liberal ideas associated with Eighteenth Century Europe into the Constitution. These ideas were most effectively articulated by the French Philosophes.\(^\text{142}\) In essence, Madison utilized Voltaire’s ideas in his incorporation of the Eighth Amendment.\(^\text{143}\)

Voltaire’s views also had great impact on Dr. Benjamin Rush, one of the signors of the Constitution. Dr. Rush insisted that capital punishment neither acted as a deterrent, nor did it benefit society.\(^\text{144}\) Like Voltaire, Dr. Rush argued that executions were implemented on political grounds and were therefore immoral. Also like Voltaire, he believed that capital offenses were the product of monarchial power.\(^\text{145}\) In his 1792 *Considerations on the Injustice and Impolicy of Punishing Murder by Death*, Dr. Rush wrote that “we have grafted on an infant commonwealth the manners of an ancient and corrupt monarchy and because this monarchy is a public and practical lie, 

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137. *Id.* Adams wrote that the two aged actors of philosophy embraced each other by hugging one another in their arms and the cry rose from the hall, and possibly all of Europe, “Qu’il etait charmant de voir embrasser Solon et Sophocle.” *Id.* (citing E.E. Hale, *Franklin in France*, 171-72 (1969)).

138. *Id.* Adams wrote “that although Voltaire was quite old, he had much vigor and fire to his countenance. His fight for toleration, his anger at the laws fueled this fire.” *Id.* (citing Hale, supra note 137, at 167).

139. *Id.*


145. *Id.*
[the republic] must reverse this.”146 Furthermore, Dr. Rush countered the theologic preoccupation of the Calvinists over the meaning of Genesis 9:6, “whoso sheddeth a man’s blood, by man shall his blood be shed”, by arguing that the statement was a prediction and not a commandment.147 He saw Calvinist influences as a danger to the new republic. Dr. Rush never renounced Christianity, but he argued the philosophy of the newer Unitarian Church—that it was the responsibility of the law to save mens lives, not to destroy them.148

Such anti-capital punishment language originated with Voltaire. Unlike Franklin, Voltaire’s influence on Dr. Rush is problematic because Dr. Rush never credited Voltaire, or Beccaria for their ideas. This may have stemmed from Dr. Rush’s preoccupation with Voltaire’s Catholic background. Yet clearly, Rush’s ideas mirrored those of Voltaire; these ideas were widely circulated among the state legislatures including Massachusetts and Virginia.149

All of these individuals were signatories to the Constitution, and as such, they were the leaders of the new republic. Most of them developed their political maturity during the Revolution, and as a result, were influenced by the philosophy behind the Enlightenment.150 Moreover, they understood Voltaire’s views on capital punishment — and a good majority of them accepted these views. The strongest argument that a consensus once existed in the United States, albeit for a short period, is that individuals such as Patrick Henry, Benjamin Franklin, Thomas Jefferson, James Madison, Dr. Benjamin Rush, George Washington, and John Adams (Federalists and Anti-Federalists alike), who had such disparate views on the nature of government, almost universally accepted Voltaire’s notion that capital punishment was a barbarity unworthy of a civilized nation.

CONCLUSION

If an early consensus existed against capital punishment, why did the American view change? The answer in part is that this nation turned its back on the very ideals to which it had adhered during the revolution. The generations after Franklin, Rush, and Washington were not wedded to Enlightenment ideals. Instead, it was an age of compromise. Issues such as slavery, women’s suffrage and capital punishment waited a long turn before each were specifically addressed. During the interim, the Enlightenment ideals of Voltaire faded from the legal landscape of the new republic.

Voltaire’s influence in the United States also waned as a result of the French Revolution in 1789. In the beginning, the French Revolution was sup-

146. MASUR, supra note 127, at 51.
147. Id. at 67. Dr. Rush argued that the prediction was akin to a farmer choosing not to sow his fields, and then as a result having no harvest. Id.
148. RUSH, supra note 129, at 18-19.
149. HALL, supra note 98, at 170.
ported by many Americans. Yet by 1793, with the establishment of the Committee of Public Safety under Robespierre, the execution of King Louis XVI, and the wholesale slaughter of thousands of Parisians at the guillotine by the radical Jacobins in the Committee, an American antipathy developed toward France. That Voltaire was a hero of this French Revolution in turn made him suspect. Although he predeceased the French Revolution by a decade, he had remained a hero to its instigators. Because of this, Voltaire's philosophy lost some of its luster, not only in America, but throughout the western world. Ironically, although Voltaire would have supported the Revolution in spirit, he would have abhorred both the Jacobins and Bonaparte.

Voltaire's contact with American society, law, and political leaders, established an early consensus against capital punishment. His experiences and writing served as an inspiration, not only to the visionaries who created the new republic, but to society as a whole. Both this inspiration and consensus was reflected in the language of the Eighth Amendment's prohibition against cruel and unusual punishment. In this narrow vein, Voltaire partially accomplished his goals for an enlightened society. Once the dust covering the previous two hundred years is sifted, Voltaire's arguments remain as salient today as they did two hundred years ago.